No. 92-7247-CFX
Status: GRANTED

Title: Dee Farmer, Petitioner
v.
Edward Brennan, Warden, et al.

Docketed:
January 1, 1993

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Farmer,Dee, Bronstein,Alvin J.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 30 1992	G	Application (A92-348) to extend the time to file a petition for a writ of certiorari from November 5, 1992 to January 4, 1993, submitted to Justice Stevens.
2	Nov 2 1992		Application (A92-348) granted by Justice Stevens extending the time to file until January 4, 1993.
3	Jan 1 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Mar 5 1993		Waiver of right of respondents Edward Brennan, Warden, et al. to respond filed.
6	Mar 11 1993		DISTRIBUTED. March 26, 1993
7	Mar 17 1993	P	Response requested -- JPS. (Due April 19, 1993)
9	Apr 19 1993		Order extending time to file response to petition until May 19, 1993.
10	May 10 1993		Brief of respondent United States in opposition filed.
11	May 20 1993		REDISTRIBUTED. June 4, 1993
12	Jun 1 1993		Record requested -- JPS.
13	Jun 28 1993		Record filed.
		*	Proceedings from USCA/7 and USDC for the Western District of Wisconsin
14	Jul 1 1993		REDISTRIBUTED. September 27, 1993
16	Oct 4 1993		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m.,Wednesday,January 5, 1994. Rule 29 does not apply. **********
17	Oct 14 1993	G	Motion of petitioner for appointment of counsel filed.
18	Nov 1 1993		Motion for appointment of counsel GRANTED and it is ordered that Alvin J. Bronstein, Esquire, of Washington, D. C., is appointed to serve as counsel for the petitioner in this case.
19	Nov 9 1993		Joint appendix filed.
24	Nov 9 1993		Brief amicus curiae of Montana Defender Project filed.
21	Nov 15 1993		Brief amicus curiae of Stop Prisoner Rape filed.
20	Nov 16 1993		Brief amicus curiae of D.C. Prisoners' Legal Services Project, Inc. filed.
22	Nov 16 1993		Brief of petitioner Dee Farmer filed.
23	Nov 22 1993		SET FOR ARGUMENT WEDNESDAY, JANUARY 12, 1994.(2ND CASE).
25	Nov 29 1993		CIRCULATED.

No. 92-7247-CFX

Entry	Date	Note	Proceedings and Orders
26	Dec 14 1993	X	Brief amici curiae of Maryland, et al. filed.
27	Dec 14 1993	X	Brief of respondents Edward Brennan, Warden, et al. filed.
28	Jan 3 1994	X	Reply brief of petitioner Dee Farmer filed.
29	Jan 12 1994		ARGUED.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. 92-7247

DEE FARMER,

Petitioner,

vs.

EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS, N.W. SMITH, MICHAEL QUINLAN and CALVIN EDWARDS,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner Dee Farmer, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in the United States District Court for the Western District of Wisconsin. Petitioner's affidavit in support of this motion is attached hereto.

DEE FARMER
UNITED STATES MEDICAL CENTER
FOR FEDERAL PRISONER'S
1900 West Sunshine Street
Post Office Box 4000
Springfield, Missouri 65808

In Propria Persona

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No.

DEE FARMER,

Petitioner,

vs.

EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS, N.W. SMITH, MICHAEL QUINLAN and CALVIN EDWARDS,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, DEE FARMER, declare that I am the petitioner in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay the fees, cost or give security therefor, I state that because of my proverty, I am unable to pay the costs of said proceeding or give security therefa; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present in my Petition for A Writ of Certiorari to the Supreme Court of the United States is setforth in said petition submitted herewith.

In further support of this application, I answer the following questions:

1. Are you presently employed? Yes ___ or No X

   a. If the answer is "yes" state the amount of your salary or wages per month, and give the name and address of your employer. (list both gross and net salary)

   b. If the answer is No, state the date of last employment and the amount of the salary and wages per month which you recieved.

   $5.00 a month (2/91 Prison job)

2. Have you recieved within the past tweleve months any money from any of the following sources?

   a. Business, profession or other form of self-employment? Yes___ No X

   b. Rent payments, interest or dividends? Yes___ No X

   c. Pensions, annuities, or life insurance payments? Yes___ No X

   d. Gifts or inheritemce? Yes___ No X

   e. Any other sources? Yes___ No X

If the answer to any of the above is "yes" describe each source of money and state the amount recieved from each during the past tweleve months.

3. Do you own any cash, or do you have money in checking or savings accounts? (include funds in prison accounts) Yes___ No X

4. Do you own or have any interest in any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No X

If the answer is "yes," describe the property and state it's approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

N/A

I declare under the penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. § 1746.

Executed on Jan. 1, 1993

DEE FARMER

ORIGINAL

No. 92-7247

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

DEE FARMER,

Petitioner,

v.

EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS, N.W. SMITH, MICHAEL QUINLAN and CALVIN EDWARDS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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In Propria Persona

No.

IN THE
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* Dee Farmer expresses appreciation to Raissa Lerner, Havard Law Student, and Wayne B. Alexander of Odyssey for their assistance in the preparation of this brief.

QUESTION PRESENTED FOR REVIEW

In the case involving the rape of a transsexual federal prisoner, can prison administrators be held liable under the Eighth Amendment proscription against cruel and unusual punishment, as defined by this Court in Wilson v. Seiter, 115 L.Ed.2d 271 (1991), when they "knew or should have known" of the danger facing a transsexual prisoner placed into the population of a violent maximum security penitentiary, where she was brutally beaten and raped, or may liability only be found if they have "actual knowledge" of the impending harm?

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

DEE FARMER,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner Dee Farmer, plaintiff[1] in the District Court and appellant in the Court of Appeals, respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment in Farmer v. Brennan, et al., No. 92-1772 (7th Cir. Aug. 7, 1992).

[1] Farmer prefers the use of feminine pronouns for self-description, and the Court of Appeals previously respected her choice. Farmer v. Haas, et al., No. 90-1038 slip op. at 1 n.1 (7th Cir. Mar. 1, 1991) Pet. App. 10A-13A.

OPINIONS BELOW

The Court of Appeals opinion is unreported and reproduced at pp. 1A-2A of the Appendix of this Petition (hereinafter "Pet. App."). The opinion of the United States District Court for the Western District of Wisconsin is unreported and reproduced at Pet. App. 3A-9A.

JURISDICTION

The Court of Appeals decision was issued on Aug. 7, 1992. Petitioner having forgone the right to Request for Rehearing and Suggestion for Rehearing En Banc, judgment was entered on August 7, 1992. This Court's jurisdiction arises under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides, "excessive bail shall not be required, nor cruel and unusual punishment inflicted."

STATEMENT OF THE CASE

A. The Facts

Petitioner Dee Farmer, a federal prisoner was committed to the custody of the Attorney General of the United States for a twenty-year term of imprisonment imposed for access device fraud.[2] At the time of her incarceration Farmer was a pre-

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2 Farmer was sentenced in the District of Maryland for offenses under Title 18, Section 1029.

operative transsexual (preparing for sex reassignment surgery) who had silicone implants, had attempted to have surgical castration and was recieving conjugated estrogen hormone pills.

Farmer commence serving her sentence within the Federal Bureau of Prisons institutions. On November 7, 1986 she was committed to the United States Penitentiary, Lewisburg, Pennsylvania (hereinafter "USP-Lewisburg"). Farmer spent her entire stay at USP-Lewisburg in administrative detention. Because "placing [Farmer], a twenty-one year old transsexual, into the general population at Lewisburg, a Level Five security institution, could pose a significant threat to internal security in general and to [Farmer] in particular." (quoting Farmer v. Carlson, 685 F. Supp. 1335, 1342 (M.D.Pa. 1988)).

Subsequently, Farmer was transferred to the Federal Correctional Institution, Oxford, Wisconsin (hereinafter "FCI-Oxford"). Prior to her arrival at FCI-Oxford and during her confinement there Farmer recieved disciplinary reports for violating prison rules. All of the disciplinary reports involving Farmer were of a nonviolent and nonaggressive nature. In fact, the majority of the disciplinary reports related to Farmer's transsexualism. For example, she recieved several disciplinary reports for attempting to introduce into the prison, or manipulate prison medical staff into prescribing for her, female hormones. Some reports involved attempts to fraudulently order, or recieve without authorization, female clothing, make-up, etc. Others pertained to her wearing prison garb in what may best be described as a feminine manner.

Consequently, prison officials, who are the respondents in

this Court, recommended that Farmer be transferred to a maximum security prison. These prison officials designated, transferred and imprisoned Farmer at the United States Penitentiary, Terre Haute, Inidana (hereinafter "USP-Terre Haute").[3]

On March 23, 1989 Farmer was released into the general population at USP-Terre Haute. On April 1, 1989 approximately one week later, during the late evening hours, an inmate known to Farmer only as "D.C.", entered her cell and demanded that she have sex with him. When she refused he punched her in the face, knocking her back up against the steel prison locker and into the cell's barred window. He continued to punch her, while she continously tried to grab his hands. At which time he said, "if you don't let my hands go I will use my feet." Despite, Farmer's pleas the assailant raised his foot and began kicking her, revealing a homemade knife stuck in the side of his sneaker. Becoming even more frightened after seeing the knife, the assailant with less resistance from Farmer proceeded: tearing Farmer's clothing from her, holding her down on the bunk, and forcibly raping her anus.

Farmer was confined in administrative segregation, where she remained, until being transferred to a lesser security institution.

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3 It must be noted that prison officials admitted that the penitentiary would not offer Farmer needed additional security or benifits that was not present at FCI-Oxford.

B. Course of Proceedings and Disposition Below

Farmer filed a pro se complaint in the United States District Court for the Western District of Wisconsin (Shabaz, J.), alleging that respondents at FCI-Oxford and elsewhere had been deliberate indifferent to her saftey by recommending, designating, transferring and confining her in a violent maximum security penitentiary, resulting in her being brutally beaten and raped. Jurisdiction was based upon the presence of a federal question, under 28 U.S.C. § 1331, in that the action was a Bivens-type claim under the Constitution. The District Court granted Farmer leave to proceed in forma pauperis.

In Farmer's complaint, affidavits and other supporting documentation she showed that respondents were deliberate indifferent to her saftey, because they were fully knowledgable of her transsexualism, and the danger of placing her, or any similarly situated transsexual prisoner, in a violent "penitentiary environement" where violent, aggressive and maximum security offenders are housed. It was further presented by Farmer that the respondents were knowledgable of the frequent assualts, fights and other acts of violence within USP-Terre Haute prison population, including sexual assualts. And that narcotic drugs, alcohol and numerous known violent and aggressive homosexual rapist permeate the prison population. Moreover, it was documented that respondents were knowledgable that numerous prisoners, who are not transsexual, request protection at USP-Terre Haute, because of fear for their lives in the violent general population of the prison.

The district court granted respondents motion for summary

judgment of dismissal, holding that "none of the defendants had actual knowledge that there was a threat to plaintiff's saftey at USP-Terre Haute." Pet. App. 6-A. The district court relied on the Seventh Circuit's holding in McGill v. Duckworth, 944 F. 2d 344, 349 (7th Cir. 1991) that prison officials are liable under the Eighth Amendment only if they had "actual knwoledge" of a threat to an inmate's saftey, and fail to take preventive action. Thus, rejecting explicitly the proposition that the Eighth Amendment impose liability when prison officials "should have known" of a danger to an inmate's saftey, and fail to take preventive action.

Upon appeal to the Seventh Circuit, the district court judgment was summarily affirmed without opinion. Pet. App. 1A The Seventh Circuit affirmed the district court's decision despite the fact, that the respondents "knew or should have known" of the danger facing Farmer at USP-Terre Haute. Apparently, giving allegiance to it's holding in McGill that the Eighth Amendment does not impose liability upon prison officials who merely "should have known" of a danger to a prisoner's saftey.

REASONS FOR GRANTING THE WRIT

This case presents an important issue of constitutional law. The Seventh Circuit decision conflicts with decidons of the Third and Ninth Circuits, see Sup. Ct. R. 10.1(a), and conflicts with this Court's cases prohibiting unnecessary and wanton infliction of pain upon prisoners, see id. 10.1(c).

In McGill v. Duckworth, 726 F.Supp. 1144 (N.D.Ind. 1989) this district court recognized that,

> Under the Eighth Amendment a prison official can be found liable for failing to protect a prison inmate from an attack by another offender only if that official acts with "deliberate indifference." To prove 'deliberate indifference', the [prison inmate] must prove by a preponderance of the evidence that a defendant prison official intentionally or recklessly disregarded a substantial risk of danger that was known to him or would have been readily apparent to a reasonable person in his position.
>
> * * * * * * * * * * * * * *
>
> A [prison official] acts with 'deliberate indifference' when he knows of the danger or where the threat of violence is so pervasive that his knowledge may be inferred, yet he fails to enforce a policy or take other reasonable steps which may have been prevented the harm. A [prison official] acts recklessly or with 'reckless disregard' when he disregards a substantial risk of danger that either is known to him or would be apparent to a reasonable person in his position.

Id. at 1143-49.

With this rudimentary principle of the Eighth Amendment in tact, the Indiana District Court in McGill concluded that certain inmates belonged to an identifiable group of individuals

for whom the risk of attack is so substantial and evident that prison officials failure to protect them from attack states a claim of deliberate indifference. The Court went on to point-out the Seventh Circuit's ruling that transsexual inmates housed in an all-male prison, face an apparent substantial risk of attack; thus, an identifiable group of inmates who prison officials must take reasonable steps to protect from harm. Meriwether v. Faulkner, 821 F. 2d 408, 417-18 (7th Cir.) cert. denied, 434 U.S. 935 (1987).

On cross-appeals the Seventh Circuit reversed the district court's holding that the Eighth Amendment allows liability to be imposed on prison officials, "when [they] disregard a substantial risk of danger that either . . . [they should have known] or would be apparent to a reasonable person in [their] position." See McGill v. Duckworth, 944 F.2d 344, 348 (7th Cir. 1991).

In it's rejection of the district court's "should have known" approach the Seventh Circuit said, "[p]risoners are dangerous (that's why many are confined in the first place). Guards have no control over the temperment of the inmates they supervise, the design of the prisons, the placement of the prisoners, and the ratio of staff to inmates. Some level of brutaility and sexual aggression among them is inevitable no matter what the guards do. Worse: Because violence is inevitable unless all prisoners, are locked in their cells 24 hours a day and sedated (a "solution" posing constitutional problems of it's own) it will always be possible to say that the guards "should have known" of the risk. Indeed they should and do." Id. at 348 The court concluded:

"[a]pplied to a prison, the objective "should have known" [is] rather a long distance from the Supreme Court's standards in Estelle and its offspring." id. at 348 For these reasons, the Seventh Circuit found that the "should have known" approach does not satisfy the culpable state of mind, or subjective component of the Eighth Amendment as defined by this Court in Wilson v. Seiter, 115 L.Ed.2d 271 (1991).[4]

The Third Circuit Court of Appeals considered and rejected the Seventh Circuit's position:

> Since Wilson, there has been a split among the circuit courts regarding the quantum of knowledge possessed by a prison official, necessary to satisfy the deliberate indifference requirement. In Colburn v. Upper Darby Township, 946 F. 2d 1017 (3d Cir. 1991) ("Colburn II"), we held that the Fourteenth Amendment imposes an obligation on government officials who know or should know of an inmate's particular vulnerability to suicide, not to act with reckless indifference to that vunerability. See also Williams v. Borough of West Chester, 891 F. 2d 458 (3d Cir. 1989); Freedman v. City of Allentown, 853 F.2d 1111 (3d Cir. 1988). Consistent with our approach in Colburn II, the Ninth Circuit Court of Appeals has held that a prison official is deliberate indifferent for purposes of the Eighth Amendment when he "knows or should know" of the danger facing the inmate. See Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991), quoting Colburn v. Upper Darby Township, 838 F.2d 663, 669 (3d Cir. 1988). On the other hand, the Seventh Circuit Court of Appeals has held, after Wilson, that liability should only be imposed on prison officials if they had "actual knowledge of impending harm," and has rejected liability for prison officials who merely "should have known" of danger to an inmate. McGill v. Duckworth, 944 F. 2d 344, 348 (7th Cir. 1991). Because we agree with Redman that it is appropiate to use the same standard under the Fourteenth and Eighth Amendment here, Redman, 942 F. 2d at 1442, we hold that a prison official is deliberate indifferent when he knows or should have known of a sufficient serious danger to an inmate.

Young v. Quinlan, 960 F. 2d 344, 350-61 (3d Cir. 1992).[5]

In Wilson v. Seiter this Court held that there is an objective and subjective component of an Eighth Amendment violation. The objective component requires the deprivation or harm to be sufficiently serious as to be considered punishment. Whitley v. Albers, 475 U.S. 312 (1986); Hudson v. McMillian, ____ U.S. ____ (1991). And the subjective component requires prison officials responsible for the deprivation or harm to have acted with a sufficient sulpable state of mind.

"With respect to the objective component of an Eighth Amendment violation, Wilson announced no new rule." Hudson v. McMillian, ____ U.S. ____, ____ (1991). It has long been the law of the land that acts, such as rape, which are not a part of the inmate's prison sentence, are sufficiently serious to implicate the Eighth Amendment. "The Supreme Court held that the state had an affirmative duty to provide adequate medical care for prisoners since incarceration prevents an inmate from caring for hinself. Estelle, 429 U.S. at 103-104, 97 S.Ct. at 290. In Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) the Court extended Estelle to impose a duty upon the state to provide involuntarily

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4 In McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991), the Seventh Circuit also rejected the position that certain inmates belong to identifiable groups of prisoners who are at an apparent substantial risk of harm; thus overruling it's decision in Meriwether v. Faulkner, 821 F2d 408, 417-18 (7th Cir.), cert. denied, 434 U.S. 935 (1987).

5 Young v. Quinlan involved the rape of a federal prisoner placed in a violent maximum security prison equivalent to the prison where Farmer was raped.

committed mental patients such services as are necessary to insure reasonable saftey ... from others. De Shaney by First v. Winnebago County Dept. of Social Services, 489 U.S. 189 ... (1989). [There is] no qualitative difference here where [Farmer], by reason of [her] incarceration, is wholly dependent upon prison officials for protection ..." Young v. Quinlan, 944 F. 2d 344, 361-362 (3d Cir. 1992) (internal quotations omitted).

The subjective component established in Wilson did not provide an affirmative guidance in determining the quantum of knowledge prison officials must possess to satisfy the Eighth Amendment culpable state of mind requisite. Consequently, the circuit courts have grappled with, and are divided over, the question of whether the subjective component requires prison offcials to have "actual knowledge", or if it is satisfied when they "should have known". It is not surprising that the circuit courts are in a discordancy over the culpable state of mind component, as the dissenting Justices in Wilson explained:

> Inhuman prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution such as a prison system.

Wilson v. Seiter, ____ U.S. ____ (1991).

In the abstract, the dissenters are correct. But in practice, the lower courts have largely construded the "culpable state of

mind" to be satisfied, when prison officials knew or should have known of a substantial risk of danger that would be apparent to a reasonable person in his position. Cortes-Quinones v. Jiminez-Nettleship, 842 F. 2d 556, 559-560 (1st Cir. 1988) The Seventh Circuit decision in McGill is the very eradication of the Eighth Amendment guarantee to be free from cruel and unusual punishment that the dissenters envisioned. Under the McGill decision, a prison official is only liable if he has "actual knowledge." This means that if prison officials without checking the prison records place a prisoner who is in the Federal Witness Protection program in an institution where the very persons he is supposed to be protected from are confined, resulting in his being murdered, they would not be liable because they had no "actual knowledge" of the danger. McGill rejects the propisition that they "should have known" by checking the records. Likewise, the Seventh Circuit, in accord with its' position in McGill, held that placing Farmer, a transsexual prisoner, in a violent maximum security penitentiary environment resulting in her being brutally beaten and raped, did not expose prison officials to liabilitiy, because they had no "actual knowledge" that Farmer was going to be raped. This ignores the fact, the risk of Farmer being raped was so substantial that prison officials "should have known", as it would have been apparent to a reasonable person in their position —— even a lay person.

The Third Circuit Court of Appeals explained that,

> should have known is a phrase of art with a meaining distinct from it's usual meaning in the context of law of torts ... should have known: [D]oes not refer to a failure to note a risk that would be percieved with the use of ordinary prudence. It connotes something more than a negligent failure to appreciate the risk ..., though something less than subjective appreciation of that risk. The "strong likelihood" of [harm] must be "so obvious that a lay person would easily recognize the necessity for " preventative action; the risk ... of injury must be not only great, but also sufficiently apparent that a lay custodian's failure to appreciate it evidences an absence of any concern for the welfare of his or her charges. (citations omitted)

Young v. Quinlan, 960 F. 2d at 361.

This Court has implicitly held that to disregard a substantial risk either known, should have been known, or apparent to a reasonable person satisfies the Eighth Amendment culpable state of mind component. In Canton v. Harris, 489 U.S. 378 (1989), this Court held that a municipality could be held liable for inadequate police training if the inadequacy amounted to a policy of deliberate indifference. It was observed that "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the adequacy so likely to result in the violation of constitutional rights, that policy-makers of the city can reasonably be said to have been deliberate indifferent to the need." Id. at 389-90.

In a recent inmate-inmate assualt case, which Wilson cites as an example of the standard, a federal appeals court held that deliberate indifference is shown "if there is an obvious unreasonable risk of violent harm to a prisoner or group of prisoners which is

known to be present or should have been known, and [the prison officials] were outrageously insensitive or flagrantly indifferent to the situation and took no significant action to correct or avoid the risk of harm ..." Morgan v. District of Columbia, 824 F. 2d 1049, 1058 (D.C. Cir. 1987).

Another case cited with approval in Wilson is Cortes-Quinones v. Jiminez-Nettleship, 842 F.2d 556, 559-60 (1st Cir. 1988). In that case, which is similar to the case at bar, the circuit court upheld a jury verdict against the Puerto Rico's Director of Penal Institutions and it's Corrections Administrator for transferring a psychotic prisoner to a grossly overcrowded general population facility that provided no mental health care; the prisoner was murdered by other inmates. The jail superintendent was also held liable for failing to have the prisoner's file reviewed promptly by any professional staff to determine whether he needed to be segregated. Similarly, a transsexual prisoner transferred to a violent maximum security penitentiary that houses aggressive and violent offenders, including known violent homosexual rapist places the transsexual prisoner at as much, if not more, risk than a psychotic prisoner transferred to a facility without mental health care.

This Courts statement in Wilson that "the long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent" further implies that the Seventh Circuit's "actual knowledge" approach is faulty.

The rationale offered by the Seventh Circuit for it's "actual knowledge" approach in McGill v. Duckworth, 944 F. 2d 344

(1991) is not only unsound in application, but also illogical. For example, the Court explains:

> The size of prisons, the number of separate areas, and so on, are in the hands of the state. Legislatures decide how many prisons to build (and how many guards per prisoner to hire); architects design the buildings; judges fill them. Crowding is epidemic, as taxpayers reluctant to foot the bill for increased space also clamor for longer sentences that may increase the prison population. Administrators in many states ... consequently are unable to house each inmate only with those of a similar status ... The "should have known" approach allows [prisoners] to tax employees of the prison system with the effects of circumstances beyond ther control.

McGill v. Duckworth, 944 F. 2d at 349 (7th Cir. 1991)

The Wilson majority rejected this cost defense, which the Seventh Circuit relies upon. In rejecting the criticism that a state of mind requirement would permit prison officials to escape liability on the ground that "fiscal constraints beyond their control prevent tje elimination of inhumane conditions" this Court held that such policy considerations could not affect the decision whether an intent requirement is implicit in the word "punishment". It then added that no "cost" defense was before it and it was aware of no case in which such a defense had been raised in prison deliberate indifference cases. Though, the prison officials in McGill do not raise a cost defense, the Seventh Circuit postulate the existence of such a defense in explaining it's "actual knowledge" approach. The Seventh Circuit does not recognize this Court's rejection in Wilson of a cost defense.

With regard to the Seventh Circuit's "beyond their control" rationale, in Cotes-Quinones v. Jiminez-Nettleship, supra., the prison murder case cited in Wilson and discussed above, the circuit court concluded that many factors were beyond prison officials control, but hold that each defendant could be found deliberate indifferent based on their own actions and omissions in putiing a known psychotic prisoner in general population and not segregation, and in failing to provide for any system that would achieve result.

The Seventh Circuit decision in McGill, the "actual knowledge" appraoch, veritably casts prison officials as helpless agents of the state without any ability to relieve the overcrowding, violence, drug use, etc., which exist within the prisons. This is not true, of course. Prison officials can review prisoner's records and at least separate the extreme aggressive types from the extreme vulnerable types. There are many preventive steps prison officials can and often do implement to relieve the amount of violence, rape, drug use, suicide, etc., within the prisons. The Seventh Circuit picture of prison officials as turn-keys standing outside the prison gates, fences and walls ensuring that no prisoners escape, but helpless to do anything about the rape, murder, stabbings, beatings, drug use, extortion, etc., that occur regularly inside the prison is a far cry from the truth. And equally as far from the guarantees of the Cruel and Unusual Punishment Clause.

Prison administrators and officials are in a position to know what type of prisoners are in what institutions; and what danger exist in which prisons. Contrary to the Seventh Circuit

decision in McGill placing a young transsexual prisoner --vulnerable to attack-- in a prison which houses violent, aggressive and maximum security prisoners, who are known homosexual rapist and drug users, is to disregard a risk of danger so substantial that the culpable state of mind or subjective component of an Eighth Amendment claim, as established in Wilson should be satisfied. Thus, prison officials "should have known" that recommending, designating, transferring and confining Farmer, an overtly feminine transsexual prisoner, in the violent penitentiary environment of USP-Terre Haute would result in her being assualted and raped. Though, the respondents confined Farmer at USP-Terre Haute because of her nonviolent and nonaggressive disciplinary infractions, rape is not a punishment that prison officials can expose or subject a prisoner to for violating prison rules.

This Court should grant certiorari here to explicitly rule that the culpable state of mind or subjective component of an Eighth Amendment claim is satisfied when prison officials disregard a substantial risk of danger that was known to them or should have been known; or would have been readily apparent to a reasonable person in their position and, further, to resolve the conflict between the Circuits.

CONCLUSION

The Court of Appeals affirmance of the district court's judgment that subjecting a transsexual prison to a substantial risk of rape does not satisfy the deliberate indifference standard, because prison officials were without "actual knowledge" of the impending

rape is contradictive of todays standards of human decency, which this Court has repeatedly held is guaranteed to prisoners through the Eighth Amendment. The Circuits utilizing the "actual knowledge" approach does so without logic or practical application, and strip prisoners of all expectations that they will not be subjected to substantial harm or deprivations of life necessities. Accordingly, Farmer respectfully requests that this Court issue a writ of certiorari to review and reverse the judgment of the Court of Appeals.

Respectfully submitted,

Dee Farmer

APPENDIX

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United States Court of Appeals jk

For the Seventh Circuit
Chicago, Illinois 60604

SUBMITTED: August 6, 1992
August 7, 1992

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

DEE FARMER, Plaintiff-Appellant, No. 92-1772 v. EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS, et. al., Defendants-Appellees.	] Appeal from the United] States District Court for] the Western District of] Wisconsin.]] No. 91 C 716] John C. Shabaz,] Judge.]

This matter comes before the court for its consideration upon the request for the following documents:

1. **PETITION FOR LEAVE TO FILE AND TO PROCEED ON APPEAL IN FORMA PAUPERIS"** filed herein on 5/28/92, by the appellant.

2. **"MOTION TO CONSOLIDATE CASES"** filed herein on 7/17/92, by the appellant.

This court has carefully reviewed the final order of the district court, the record on appeal and the appellant's motion. Based on this review, the court has determined that any issues which could be raised are insubstantial and the filing of briefs would not be helpful to the court's consideration of the issues. *See Mather v. Village of Mundelein*, 869 F.2d 356, 357 (7th Cir. 1989) (*per curiam*) (court can decide case on motions papers and record where briefing would be a waste of time and no member of the panel desires briefing or argument). Accordingly,

IT IS ORDERED that the appellant's motion for leave to proceed on appeal in forma pauperis is **DENIED** and the district court is summarily **AFFIRMED.**

(Over)

IT IS FURTHER ORDERED that the motion to consolidate cases is **DENIED AS MOOT.**

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

DEE FARMER,

Plaintiff,

v. ORDER

EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS, N. W. SMITH, MICHAEL QUINLAN and CALVIN EDWARDS, 91-C-716-S

Defendants.

Plaintiff Dee Farmer was allowed to proceed in forma pauperis on his Eighth Amendment claim against defendants Edward Brennan, Dennis Kurzydlo, Larry E. DuBois, N.W. Smith, Michael Quinlan and Calvin Edwards. Plaintiff alleges in his complaint that the defendants were deliberately indifferent to his safety when they transferred him to the United States Penitentiary, Terre Haute, Indiana (USP-Terre Haute) on March 9, 1989.

An amended scheduling order was entered in the above entitled matter on December 20, 1991 requiring dispositive motions to be filed not later than February 15, 1992. Defendants timely moved for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56, on February 18, 1992 the first work day after February 15, 1992. The defendants submitted proposed findings of fact and conclusions of law, affidavits and a brief in support of the motion.

Copy of this document has been
mailed to the following:
Pltf. Farmer & AUSA Van Hollen
this 20 day of March, 19 92
By
Secretary to Judge John C. Shabaz

Plaintiff's response to defendants' motion for summary judgment was to be filed not later than March 9, 1992. On March 9, 1992 defendants received a document entitled, "Rule 56(f) motion in response to defendants' untimely motion for summary judgment". This document which was not received by the Court until March 18, 1992 requests that defendants' motion for summary judgment be denied until plaintiff receives defendant Quinlan's response to his second request for documents which was to be filed not later than March 14, 1992. Since these documents, not shown by plaintiff to be necessary to oppose defendants' motion for summary judgment, were not to be filed until after both plaintiff's dispositive motion and brief in opposition to defendants' motion for summary judgment, plaintiff's Rule 56(f) motion will be denied.

On March 17, 1992 defendants filed a motion for protective order staying discovery until their motion for summary judgment on the issue of qualified immunity has been decided. Defendants' motion for a protective order will be granted.

Plaintiff also filed a brief in opposition to defendants' motion for summary judgment, an affidavit and a cross motion for summary judgment on March 18, 1992. Although plaintiff's brief in opposition to defendants' motion for summary judgment and his cross motion for summary judgment are untimely they will be considered.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if

not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff is an inmate currently confined at the United States Medical Center for Federal Prisoners, Springfield, Missouri (USMCFP). He was confined at the Federal Correctional Institution, Oxford, Wisconsin (FCI-Oxford) from January 27, 1988 until March 9, 1989.

At all times material to this action defendant Edward Brennan was the warden and defendant Dennis Kurzydlo was a unit manager at FCI-Oxford. Defendant Calvin Edwards was the warden at USP-Terre Haute from December 1987 until May 1989.

At all times material to this action defendant Larry E. DuBois was the Regional Director and defendant N.W. Smith was the Correctional Services Administrator of the North Central Region, Federal Bureau of Prisons. Defendant J. Michael Quinlan was the Director of the Federal Bureau of Prisons.

On January 25, 1989 plaintiff was found guilty by a disciplinary hearing officer at FCI-Oxford of Attempting to Give Anything of Value to Another. Disciplinary sanctions included a recommendation for a disciplinary transfer. On January 31, 1989 defendant Kurzydlo prepared plaintiff's progress report and on February 6, 1989 he requested that plaintiff be transferred to USP-Terre Haute. Defendant Kurzydlo believed that USP-Terre Haute was well equipped to handle the problems and needs presented by plaintiff.

At the time of plaintiff's transfer on March 9, 1989 defendant Calvin Edwards was the warden at USP-Terre Haute. Plaintiff never personally or through correspondence advised defendant Edwards that he was concerned for his safety. Defendant Edwards had no reason to believe that plaintiff could not function safely within the population at USP-Terre Haute. None of the defendants had actual knowledge that there was a threat to plaintiff's safety at USP-Terre Haute.

On April 1, 1989 plainitff alleges that he was sexually assaulted by another inmate. On April 7, 1989 plaintiff was placed in administrative detention pursuant to a directive from the North Central Regional Office pending a hearing concerning his HIV positive status.

CONCLUSIONS OF LAW

Plaintiff claims that his Eighth Amendment rights were violated by the defendants when they transferred him to USP-Terre Haute on March 9, 1989. Since there is no genuine dispute of any material fact this case can be decided as a matter of law. The failure of prison officials to protect an inmate from assault by another inmate may violate an inmate's Eighth Amendment rights if the officials were deliberately indifferent to a strong likelihood of attack. Meriweather v. Faulkner, 821 F. 2d 408, 417 (7th Cir. 1987), cert. denied 108 S.Ct. 311 (1987).

Prison officials are liable under the Eighth Amendment if they had actual knowledge of a threat to an inmate's safety and failed to take action to prevent the danger. McGill v. Duckworth, 944 F. 2d 344, 349 (7th Cir. 1991). A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety. Id. The officials' failure to prevent an attack of an inmate must be deliberate or reckless in a criminal sense. Santiago v. Lane, 894 F. 2d 218, 221 (7th Cir. 1990).

Defendants did not know that plaintiff would be in imminent danger of attack if he were transferred to USP-Terre Haute.

Plaintiff never expressed any concern for his safety to any of the defendants. Since defendants had no knowledge of any potential danger to plaintiff, they were not deliberately indifferent to his safety. Accordingly plaintiff's Eighth Amendment rights were not violated and defendants' motion for summary judgment will be granted. Plaintiff's cross motion for summary judgment will be denied.

Plaintiff has filed motions for telephonic depositions, photographic discovery and to compel discovery. These motions must be denied as moot. Plaintiff's motions for extension of time to name witnesses, file documents and exclude certain evidence are also denied as moot.

ORDER

IT IS ORDERED that defendants' motion for a protective order is GRANTED.

IT IS FURTHER ORDERED that plaintiff's Rule 56(f) motion and cross motion for summary judgment are DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for telephonic depositions, photographic discovery and to compel discovery are DENIED as moot.

IT IS FURTHER ORDERED that plaintiff's motions to name additional witnesses, file documents and exclude certain evidence are DENIED as moot.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

Farmer v. Brennan, et.al., 91-C-716-S

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants and against the plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 20th day of March, 1992.

BY THE COURT:

JOHN C. SHABAZ
District Judge

RESPONSE REQUESTED

ORIGINAL

No. 92-7247

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DEE FARMER, PETITIONER

v.

EDWARD BRENNAN, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

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QUESTION PRESENTED

Whether the district court properly granted summary judgment to the defendant prison officials on the ground that petitioner, a prison inmate, did not show that the officials were deliberately indifferent to his safety.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-7247

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EDWARD BRENNAN, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
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OPINIONS BELOW

The judgment order of the court of appeals, Pet. App. 1A-2A, is not reported. The order of the district court, Pet. App. 3A-9A, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1992. The petition for a writ of certiorari was filed on January 1, 1993, and is therefore jurisdictionally out of time. 28 U.S.C. 2101(c); Sup. Ct. Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a federal prisoner, filed a complaint in the United States District Court for the Western District of Wisconsin alleging that respondents, certain federal prison officials, had subjected him to cruel and unusual punishment in violation of the Eighth Amendment. The district court granted summary judgment for the prison officials. The court of appeals summarily affirmed. Pet. App. 1A-2A.

1. Petitioner was convicted of conspiracy to commit credit card access device fraud, in violation of 18 U.S.C. 1029, and he was sentenced to 20 years' imprisonment. At that time petitioner, a transsexual, was preparing for a sex-change operation.[1] In 1987, while incarcerated at the federal prison in Petersburg, Virginia, petitioner received psychiatric care for his condition and was placed in administrative detention for safety reasons. See Farmer v. Carlson, 685 F. Supp 1335 (M.D. Pa. 1988). In 1988, petitioner was transferred to the federal prison at Oxford, Wisconsin. In 1989, the prison recommended that petitioner be transferred to another institution after he was found guilty of violating prison regulations. On March 9, 1989, petitioner was transferred to the federal prison at Terre Haute, Indiana. On April 1, 1989, petitioner was allegedly assaulted by another inmate. On April 7, petitioner was placed in administrative

[1] Petitioner was born a male, but considers himself to be female. See Farmer v. Hass, No. 91-2484 (7th Cir. Apr. 2, 1993) (unrelated case involving petitioner).

detention pending a hearing concerning his HIV-positive status. Pet. App. 5A-7A.

2. Petitioner filed a civil action alleging that respondents violated his Eighth Amendment right to be free from cruel and unusual punishment when they transferred him to the Terre Haute prison where he was sexually assaulted by another inmate. The six respondents included Edward Brennan, the Oxford prison warden; Calvin Edwards, the Terre Haute prison warden; Dennis Kurzydlo, a unit manager at the Oxford prison who had recommended petitioner's transfer to the Terre Haute prison; Larry DuBois, a regional director of the Federal Bureau of Prisons; N.W. Smith, the Correctional Services Administrator of the North Central Region of the Federal Bureau of Prisons; and J. Michael Quinlan, the Director of the Federal Bureau of Prisons. Pet. App. 5A-6A.

The district court granted summary judgment for respondents. The court stated that respondents were not deliberately indifferent to petitioner's safety, because they did not know that petitioner would be subjected to an assault at Terre Haute prison. The court found that petitioner had not advised respondent Edwards that he was concerned for his safety and that Edwards "had no reason to believe that [petitioner] could not function safely within the population at USP-Terre Haute." Pet. App. 6A. The court also stated that none of the other respondents "had actual knowledge that there was a threat to [petitioner's] safety at USP-Terre Haute," ibid, and that they "did not know that [petitioner] would be in imminent danger of attack if he were

transferred to USP-Terre Haute," because petitioner "never expressed any concern for his safety to any of the defendants." Id. at 7A-8A.

The court of appeals summarily affirmed the district court's decision. Pet. App. 1A-2A.

ARGUMENT

Petitioner contends (Pet. 7-18) that respondents subjected him to cruel and unusual punishment by transferring him to a prison where he was sexually assaulted by another inmate. In particular, petitioner contends that the district court used the wrong standard to determine whether respondents were "deliberately indifferent" to his safety in prison. Although petitioner correctly observes that the courts of appeals appear to have adopted different standards for establishing deliberate indifference in failure-to-protect cases, the depth of the disagreement is uncertain and, in any event, petitioner would not prevail regardless of which standard is applied. This Court's review therefore would not be warranted even if this case were not jurisdictionally out-of-time.

1. In Wilson v. Seiter, 111 S. Ct. 2321 (1991), this Court held that a prisoner claiming that the conditions of his confinement constitute cruel and unusual punishment must make both an objective showing -- that the deprivation was sufficiently serious -- and a subjective one -- that the prison officials acted with "deliberate indifference." Id. at 2326; see also Hudson v. McMillian, 112 S. Ct. 995, 999-1000 (1992). One of the

conditions of a prisoner's confinement, the Court noted in Wilson, is the "protection he is afforded against other inmates," 111 S. Ct. at 2326-2327. Accordingly, an inmate seeking to establish an Eighth Amendment violation based on a prison official's failure to protect him must prove the official's "deliberate indifference."

The Court originally formulated the "deliberate indifference" standard in considering an Eighth Amendment claim that prisons officials failed to attend to an inmate's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). The Court has not elaborated on the meaning of the "deliberate indifference" standard in a case in which an inmate claims that prison officials failed to prevent another inmate from violently or sexually assaulting him. The courts of appeals, however, have taken different approaches to that issue.

In McGill v. Duckworth, 944 F.2d 344 (1991), cert. denied, 112 S. Ct. 1265 (1992), the Seventh Circuit held that the "deliberate indifference" standard requires the inmate to show that prison officials "had actual knowledge of the threat" to the inmate, that the attack "was readily preventable," and that, instead of preventing the attack, the prison officials "allowed [the attack] to proceed." Id. at 349. The court of appeals stated that the inmate will normally prove that the prison officials had actual knowledge by showing that the inmate notified prison officials "about a specific threat to his safety." Ibid. The court rejected the argument that an inmate can establish

"deliberate indifference" by showing that the prison officials should have known of the threat.[2] Ibid. See also Pacelli v. DeVito, 972 F.2d 871, 875-876 (7th Cir. 1992) (rejecting the "should have known" standard in the context of a claim that officials failed to release an individual in response to a writ of habeas corpus); DesRosiers v. Moran, 949 F.2d 15, 19 (1st Cir. 1991) (deliberate indifference standard requires actual knowledge of preventable, impending harm in context of claim that officials denied an inmate needed medical care).

On the other hand, in Young v. Quinlan, 960 F.2d 351, 361 (1992), the Third Circuit held that an inmate can establish deliberate indifference on the part of a prison official when the official "knows or should have known of a sufficiently serious danger to the inmate." The court stated, however, that in the context of the Eighth Amendment, the term "should have known" does not mean mere negligence; it requires that prison officials failed to appreciate a great and apparent risk, such that they exhibited an absence of concern for the inmate. Ibid. As the court explained, the test requires

> something more than a negligent failure to appreciate the risk[], though something less than subjective appreciation of that risk. The strong likelihood of [harm] must be so obvious that a lay person would easily recognize the necessity for preventative action; the risk * * * of injury

[2] The court of appeals held that, because the inmate in that case had not complained to officials, he could not show their actual knowledge of the threat to his safety. 944 F.2d at 349. The court reserved the question whether a prison official could be held liable for deliberately avoiding knowledge of the threat. Id. at 351 (drawing analogy to "ostrich" instruction in criminal law).

> must be not only great, but also sufficiently apparent that a lay custodian's failure to appreciate it evidences an absence of any concern for the welfare of his or her charges.

Id. at 361 (citations and internal quotation marks omitted).[3]

As the facts of Young illustrate, even under the Third Circuit's "should have known" test, it is not enough for an inmate to allege that he was assaulted in a prison in which he faced a risk of violence; he must show that the prison officials failed to protect him after he complained about specific threats to his safety. The inmate in Young had sued various prison officials after he was allegedly sexually assaulted by other inmates at the federal prison in Lewisburg, Pennsylvania, following his transfer from a lower-security federal prison in Seagoville, Texas. The Third Circuit held that summary judgment was improper as to some of the Lewisburg prison officials to whom

[3] The Third Circuit stated (960 F.2d at 360) that it agreed with the standard for establishing deliberate indifference set forth in Redman v. County of San Diego, 942 F.2d 1435 (9th Cir.) (en banc), cert. denied, 112 S. Ct. 972 (1991). In that case, the Ninth Circuit applied a "known or should have known" standard in the context of dangers facing pretrial detainees. The inmate's suit in Redman was based on the Due Process Clause, not on the Eighth Amendment, and, although the Redman court relied on Eighth Amendment cases in formulating its approach, it recognized that the two contexts may raise distinct concerns. 942 F.2d at 1440 n.7 ("The due process clause provides a different standard for pretrial detainees than does the eighth amendment's proscription against 'cruel and unusual punishment' for convicted prisoners * * * ."); id. at 1443 (reserving whether Eighth Amendment inquiries "are appropriate for claims brought by pretrial detainees under the Due Process Clause"). Cf. Davidson v. Cannon, 474 U.S. 344, 348 (1988) (mere negligence is insufficient for liability under the Due Process Clause for a prison official's failure to protect one inmate from another). The ultimate test applied by the Redman court is murky; in any event, because that case applied the Due Process Clause, it does not squarely conflict with the decision here.

petitioner had complained about the repeated sexual assaults by other inmates. 960 F.2d at 362-363. But the court of appeals held that summary judgment was proper as to the Bureau of Prisons officials and the Seagoville prison officials who had not been notified of the specific threats to the inmate's safety. Id. at 358 n.14.

In light of the Third Circuit's relatively stringent requirements for proving that prison officials should have known of the risk of harm, the significance of its purported disagreement with the Seventh Circuit's standard is unclear. For example, even if petitioner's claim were evaluated under the Young standard, he would not be entitled to any relief. Unlike the inmate in Young, petitioner did not express his concern about his safety to any prison official, much less the ones in the prison in Terre Haute where the sexual assault allegedly occurred. Pet. App. 7A-8A. For that reason, none of the respondents had any reason to believe that there was a substantial danger to petitioner. Moreover, the difference between the Third and Seventh Circuit approaches may be further diminished by the Seventh Circuit's suggestion that it would treat the intentional failure to acquire information about a risk to an inmate as equivalent to actual knowledge. See note 2, supra. In the absence of clarification of the contours of the "deliberate indifference" standards

followed in the Third and Seventh Circuits, this Court's intervention would be premature.[4]

In any event, petitioner would not have prevailed even under a relaxed version of the "should have known" standard. The district court specifically concluded in this case that petitioner did not meet the "should have known" standard with respect to the warden of the Terre Haute prison. The court found that "[d]efendant Edwards had no reason to believe that [petitioner] could not function safely within the population at USP-Terre-Haute." Pet. App. 6A. There is no basis for a different finding as to the other respondents, who had a less direct relationship to petitioner. In sum, under any standard, petitioner did not prove that respondents were deliberately indifferent to his safety, and the district court properly granted summary judgment dismissing his claim.

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[4] To the extent that other courts of appeals have addressed the issue since this Court's decision in Wilson v. Seiter, supra, they have not formulated clear standards. See, e.g., Northington v. Jackson, 973 F.2d 1518, 1525 (10th Cir. 1992) ("the failure to protect inmates from attacks by other inmates may rise to an Eighth Amendment violation if the prison officials[']conduct amounts to an obdurate and wanton disregard for the inmate's safety"). Pre-Wilson decisions are also inconclusive. See, e.g., Marsh v. Arn, 937 F.2d 1056, 1069 (6th Cir. 1991) (in context of Bivens action, canvassing case law on deliberate indifference and concluding that "a reasonable person in 1985, and perhaps even today, would have had trouble determining whether [the official's] conduct violated the eighth amendment").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

MAY 1993

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DEE FARMER, PETITIONER	)	
	)	
V	)	NO. 92-7247
	)	
EDWARD BRENNAN, WARDEN, ET AL.	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, by first-class mail, postage prepaid, this 10th day of MAY, 1993.

DEE FARMER
9595 WEST QUINCY AVENUE
LITTLETON, CO 80123

William C. Bryson

WILLIAM C. BRYSON
Acting Solicitor General

May 10, 1993

No. 92-7247

In The

Supreme Court of the United States

October Term, 1993

DEE FARMER,

Petitioner,

v.

EDWARD BRENNAN, WARDEN, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed January 1, 1993
Certiorari Granted October 4, 1993

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03/17/92 MOTION FOR PROTECTIVE ORDER BY DEFTS.

03/17/92 BRIEF IN SUPPORT OF MOTION/PROTECTIVE ORDER BY DEFTS.

03/17/92 ORDER DENYING PLTF'S MOT. FOR DARION WILLIS WRIT.

03/17/92 MOTION FOR COURT ORDER PERMITTING TELEPHONIC DEPOSITION OF WITNESSES BY PLTF.

03/17/92 MOTION FOR ORDER PERMITTING PHOTOGRAPHIC DISCOVERY BY PLTF.

03/17/92 MOTION IN LIMINE BY PLTF.

03/18/92 MOTION BY PLTF. PER RULE 56(f) IN RESPONSE TO DEFTS' MOT. FOR S/J.

03/18/92 AFFIDAVIT OF DEE FARMER.

03/18/92 BRIEF IN OPPOSITION BY PLTF. TO S/J.

03/18/92 MOTION BY PLTF. TO NAME WITNESS OUT OF TIME.

03/18/92 MOTION FOR SUMMARY JUDGMENT BY PLTF.

03/18/92 MOTION BY PLTF. TO FILE DOCU. OUT OF TIME.

03/18/92 AFFIDAVIT OF DEE FARMER.

03/23/92 ORDER GRANT'G MO/PROT. ORDER & DEFT. MO/SJ; DENYING MO/TELE. DEPOS; & PLTF. CROSS MO/SJ; JUDGMENT ENT'D W/PREJ. & COSTS.

03/23/92 JUDGMENT ENTERED.

04/02/92 NOTICE OF APPEAL by pltf of judgmt. NO FEE PD, NO JS FILED, SR SENT CC; PARTIES

04/08/92 ORDER that pltf's req to proc ifp on appeal is DENIED.

09/02/92 ORDER FROM USCA THAT DIST CRT IS AFFIRMED.

06/14/93 RECORD TRANSMISSION REQ FROM USSC. *RECORD SENT TO U.S.S.C.*

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

DEE FARMER,	)	
	)	Case No.
Plaintiff,	)	91-C-716-S
	)	
v.	)	
	)	
EDWARD BRENNAN, ET AL.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION TO DISMISS

Defendants, by their attorneys, Kevin C. Potter, United States Attorney for the Western District of Wisconsin, by J.B. Van Hollen, Assistant United States Attorney for that District, hereby move the Court to dismiss the above-entitled action pursuant to Rule 12(b)(1) and (6), Federal Rules of Civil Procedure, and as further grounds for dismissal, defendants move to dismiss pursuant to Rules 12(b)(2) and (5) as it regards to jurisdiction over the persons of L.E. DuBois and N.W. Smith and as L.E. DuBois and N.W. Smith have not been personally served. This motion is based upon the attached memorandum of law and supporting declarations which are incorporated by reference.

Dated this 28th day of October, 1991.

Respectfully submitted,

KEVIN C. POTTER
United States Attorney

By: /s/ J. B. Van Hollen
J. B. VAN HOLLEN
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

(Caption Omitted In Printing)

Civil Action No. 91-C-716-S

DECLARATION OF LARRY E. DUBOIS

I, Larry E. DuBois, hereby declare and state as follows:

1. At the time of Plaintiff's transfer in March, 1989, which is the subject of this action, I was employed as Regional Director, North Central Region, Federal Bureau of Prisons. As the Regional Director, North Central Region, I exercised supervisory responsibilities and relied upon my subordinate staff to conduct investigations and process transfers for inmates.

2. I have not received summons and complaint in this case. I have been informed that on August 28, 1991, staff at the North Central Regional Office received summons and complaint by way of U.S. Mail, certified, return receipt requested. I have reviewed the complaint as forwarded to me but have not acknowledged receipt of the complaint or summons, nor have I received service of the complaint and summons in any other manner.

3. Concerning the allegations in the complaint, I necessarily relied upon my subordinate staff to investigate the need for transfer. I have no direct personal knowledge concerning this transfer. I recall no personal involvement in the decision to transfer this inmate from FCI-Oxford to USP-Terre Haute in March 1989.

4. I am not a resident, nor do I own property, operate a business, or have any other connection with or within the State of Wisconsin.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 6, 1991.

/s/ Larry E. DuBois
Larry E. DuBois
Former Regional Director
North Central Region
Federal Bureau of Prisons

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Civil Action No. 91-C-716-S

(Caption Omitted In Printing)

DECLARATION OF N.W. SMITH

I, N.W. Smith, hereby declare and state as follows:

1. At the time of Plaintiff's transfer in March, 1989, which is the subject of this action, I was employed as Correctional Services Administrator, North Central Region, Federal Bureau of Prisons. As the Correctional Services Administrator, North Central Region, I exercised supervisory responsibilities and relied upon my subordinate staff to conduct investigations and process transfers for inmates.

2. I have not received summons and complaint in this case. I have been informed that on August 28, 1991, staff at the North Central Regional Office received summons and complaint by way of U.S. Mail, certified, return receipt requested. I have reviewed the complaint as forwarded to me but have not acknowledged receipt of the complaint or summons, nor have I received service of the complaint and summons in any other manner.

3. Concerning the allegations in the complaint, I necessarily relied upon my subordinate staff to investigate the need for transfer. I have no direct personal knowledge the need for transfer. I have no direct personal knowledge concerning this inmate. I relied upon information provided by the institution which indicated that the plaintiff posed a significant risk to other inmates by his behavior. He was transferred as a result of disciplinary problems.

He had been found guilty by a Disciplinary Hearing Officer of engaging in anal sex with an inmate on the recreation yard of the Special Housing Unit at FCI-Oxford on January 23, 1989. Plaintiff knew since at least March 11, 1988 that he was HIV-positive and he had been counseled on several occasions regarding the grave danger such activity presented to other inmates.

4. This inmate was classified from September 17, 1987 to April 4, 1990 as a Security Classification Level 5 inmate under Bureau of Prisons policy. At FCI-Oxford, he was being housed in a Security Level 4 institution. While USP-Terre Haute still retained the "penitentiary" title conferred by Congress many years ago, it was in fact a Security Level 4 institution by policy at the time of this transfer. This inmate could have been transferred consistent with his security classification to any of the Security Level 5 institutions, which at that time included Lewisburg, Leavenworth and Lompoc. Instead, he was transferred to Terre Haute for the purpose of placing him in a different environment consistent with his individual security needs. The correctional staff at USP-Terre Haute was well equipped in my opinion to handle the problems and needs presented by this inmate, and I relied upon this in my evaluation and decision to transfer.

5. I am not a resident, nor do I own property, operate a business, or have any other connection with or within the State of Wisconsin.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 10, 1991.

/s/ N.W. Smith
N.W. Smith
Former Correctional Services
Administrator
North Central Region
Federal Bureau of Prisons

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

(Caption Omitted In Printing)

91-C-716-S

DECLARATION OF E. J. BRENNAN

I, Edward J. Brennan, hereby declare as follows:

1. That I am currently employed as the Warden of the Federal Correctional Institution (FCI), Oxford, Wisconsin, I have been Warden at the FCI, Oxford since July 19, 1987 to date. I have served in various capacities with the Federal Bureau of Prisons since June 6, 1965.

2. Included among my duties is the responsibility for the care, supervision and control of inmates who have been committed to the custody of the Federal Bureau of Prisons and confined at FCI, Oxford, Wisconsin.

3. Douglas Farmer, Register Number #01499-025, was confined at FCI, Oxford from January 27, 1988 until March 9, 1989. He is currently confined at United States Medical Center, Springfield, Missouri.

4. I understand plaintiff alleges he was sexually assaulted while in general population at United States Penitentiary, Terre Haute, Indiana.

5. That to the best of my knowledge, I had no direct personal involvement in any of the matters alleged in the Complaint, except for signing the Transfer Order dated March 7, 1989. This order authorized transfer of inmate Farmer from FCI, Oxford to United States Penitentiary, Terre Haute, Indiana for disciplinary purposes.

6. I do not have any personal knowledge concerning this assault which allegedly occurred in Indiana on April 1, 1989, nor did I have knowledge of any assaultive behavior and threats plaintiff may be subjected to at USP Terre Haute, Indiana.

7. I certify that any actions I took which may have affected inmate Farmer with respect to the allegations contained in the complaint were taken within the scope of my official duties as Warden at the Federal Correctional Institution, Oxford, Wisconsin.

I declare under penalty of perjury pursuant to Title 28 U.S.C. 1746, that the foregoing is true and correct to the best of my knowledge.

8/30/91
DATE

/s/ E. J. Brennan
Edward J. Brennan
Warden
FCI, Oxford, Wisconsin

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

91-C-716-S

(Caption Omitted In Printing)

DECLARATION OF DENNIS M. KURZYDLO

I, Dennis M. Kurzydlo, hereby declare as follows:

1. That I am currently employed as a Unit Manager for the Federal Correctional Institution (FCI), Oxford, Wisconsin, I have been Unit Manager at the FCI, Oxford since August 27, 1989 to date. I served in the capacity of Case Manager at FCI, Oxford from July 2, 1979 until August 27, 1989. I also served in the capacity of Correctional Officer with the Federal Bureau of Prisons since November 21, 1976.

2. Included among my duties as Case Manager was the responsibility for preparing progress reports and correspondence regarding inmates as well as serve as a member on an inmate's Unit Team for classification purposes.

3. Douglas Farmer, Register Number #01499-025, was confined at FCI, Oxford from January 27, 1988 until March 9, 1989. He is currently confined at United States Medical Center, Springfield, Missouri.

4. I understand plaintiff alleges he was sexually assaulted on April 1, 1989, while in general population at United States Penitentiary, Terre Haute, Indiana.

5. On January 25, 1989, plaintiff was found guilty by the Disciplinary Hearing Officer of Attempting to Give Anything of Value to Another, Code 328A. This incident

represented Farmer's fourth incident report since his arrival at FCI, Oxford during late January 1988. As a result of this hearing, the Disciplinary Hearing Officer, (DHO) imposed the following sanctions: 15 days Disciplinary Segregation; Forfeit 15 days Statutory Good Time; and Recommend a Disciplinary Transfer. (Enclosed herewith as attachment 1 is a true and correct copy of the Disciplinary Hearing Officers Report and attachments).

6. On January 31, 1989, as part of the transfer recommendation process, I prepared a progress report on plaintiff. (Enclosed herewith as attachment 2 is a true and correct copy of the Progress Report).

7. On February 6, 1989, I also prepared a Request for Transfer memorandum. The rationale for this transfer was based upon plaintiff's involvement in several rule infractions, in particular, use of the telephone to attempt to give another inmate something of value. Additionally, plaintiff was also strongly suspected of engaging in other rule infractions such as abusing the telephone, violating a previous sanction of suspended telephone privileges and intent to commit fraud. As a member of plaintiff's Unit Team, I concurred with the recommendation of the Disciplinary Hearing Officer (DHO) and believed that plaintiff required the security and supervision offered at a Penitentiary. (Enclosed herewith as exhibit 3 is a true and correct of copy Transfer Memorandum dated February 6, 1989).

8. Plaintiff was classified from September 17, 1987 to April 4, 1990 as a Security Classification Level 5 inmate under the Bureau of Prisons policy. At FCI-Oxford, he was being housed in a Security Level 4 institution.

(Enclosed herewith as attachment 4 is a true and correct copy of plaintiffs' inmate history level).

9. While USP-Terre Haute still retained the "penitentiary" title conferred by Congress many years ago, it was in fact a Security Level 4 institution by policy at the time of this transfer. Plaintiff could have transferred consistent with his security classification to any of the Security Level 5 institutions, which at that time included Lewisburg, Leavenworth and Lompoc. Instead, he was transferred to Terre Haute for the purpose of placing him in a different environment consistent with his individual security needs. (Enclosed herewith as attachment 5 is a true and correct copy of Bureau of Prisons Facility by Regional and Level of Security and Custody).

10. In my professional opinion, the correctional staff at USP Terre Haute were well equipped to handle the problems and needs presented by this inmate, and I relied upon this in my evaluation and recommendation to transfer Farmer from FCI, Oxford to USP Terre Haute.

11. I do not have any personal knowledge concerning the alleged assault which occurred in Indiana on April 1, 1989, nor did I have knowledge of any assaultive behavior and threats plaintiff may be subjected to at USP Terre Haute, Indiana.

12. After a thorough review of plaintiff's Central File, I was unable to locate any documentation supporting the assault that plaintiff alleges to have happened.

I certify that any actions I took which may have affected inmate Farmer with respect to the allegations contained in the complaint were taken within the scope of

my official duties as Case Manager at the Federal Correctional Institution, Oxford, Wisconsin.

I declare under penalty of perjury pursuant to Title 28 U.S.C. 1746, that the foregoing is true and correct to the best of my knowledge.

/s/ Dennis M. Kurzydlo
Dennis M. Kurzydlo
Former Case Manager
FCI, Oxford, Wisconsin

10-24-91
DATE

Discipline Hearing Office (DHO) Report
U.S. Department of Justice
Federal Bureau of Prisons

FCI, Oxford, Wisconsin — Four
institution — Institution Security Level
NAME OF INMATE FARMER, Douglas REG. NO: 23288-037 UNIT: SA

Date of Incident Report: 11-23-88

Offense Code: 219/406

Date of Incident: 11-21-88

Summary of Charge(s): Stealing/Unauthorized Use of the Telephone

I. NOTICE OF CHARGE(S)

A. Advanced written notice of charge (copy of Incident Report) was given to inmate on (date) 11-23-88 at (time) 1:38PM (by staff member) T. Pierce, Acting Lieutenant

B. The DHO Hearing was held on (date) January 4, 1989 at (time) 1:26PM

C. The inmate was advised of the rights before the DHO by (staff member) D. Kurzydlo, Case Manager on (date) 11-29-88 and a copy of the advisement of rights form is attached.

II. STAFF REPRESENTATIVE

A. Inmate waived right to staff representative. Yes ___ No XX.

B. Inmate requested staff representative and Mark Ciske, Corr, Counselor appeared.

C. Requested staff representative declined or could not appear but inmate was advised of option to postpone hearing to obtain another staff representative with the result that N/A

D. A staff representative N/A was appointed.

III. PRESENTATION OF EVIDENCE

A. Inmate (admits) (denies) the charge(s). XX

B. Summary of Inmate Statement:

Mr. Cowan advised the inmate of his rights before the DHO. Inmate stated he understood his rights. It is noted in the report that inmate Farmer initially requested a staff representative, but when inmate Farmer was in the hearing room on a previous incident report, he stated he would proceed without a staff representative. Inmate Farmer then initialed on the Notice of Disciplinary Hearing form that he no longer wanted a staff representative. Farmer submitted a written statement to the DHO which is attached to this report. (Continued on attached sheet)

C. Witnesses:

1. The inmate requested witnesses. Yes __ No XX.

2. The following persons were called as witnesses at this hearing and appeared: (See Page Two)

3. A summary of the testimony of each witness is attached ___

Name of Inmate: FARMER, Douglas

___ Reg. No.: 23288-037

Date: January 4, 1989

III. C. (Continued)

4. The following persons requested were not called for the reason(s) given:

(See Attached Memorandum from Ms. DeVaney regarding inmate Williams #18845-044

5. Unavailable witnesses were requested to submit written statements and those statements received were considered N/A

D. Documentary Evidence: In addition to the Incident Report and Investigation, the DHO considered the following documents: Memoranda from Ms. Torres, Ms. DeVaney, Mr. Wertenberger, written statement of inmate Williams, investigative report from Mr. Wertenberger

E. Confidential information was used by the DHO in support of his findings, but was not revealed to the inmate. The confidential information was documented in a separate record. The confidential informant has been (confidential informants have been) determined to be reliable because N/A.

IV. FINDINGS OF THE DHO

___ A. The act was committed as charged.

XXX B. The following act was committed:
Code: 328A - Attempting To Give Anything of Value

___ C. No prohibited act was committed:
Expunge according to Inmate Discipline PS.

V. SPECIFIC EVIDENCE RELIED ON TO SUPPORT FINDINGS (Physical evidence, observations, written documentation, etc.) The report of the reporting officer which states that upon the conclusion of an extensive investigation, it has been determined that inmate Farmer used the telephone on November 21, 1988 and ordered fruit baskets and flowers from Johnson's Garden Capitol, Gaithersburg, Maryland. The total amount of this transaction was $596.25 and inmate Farmer used a Visa Credit Card to make these purchases. Inmate farmer ordered these items from an individual names "Missy" and investigation has established there is a "Missy" employed at Johnson's Garden Capitol.

(Continued on attached sheet)

VI. SANCTION OR ACTION TAKEN

Offense Severity Moderate

SGT Available 91
15 Days Disciplinary Segregation:
Forfeit 15 Days Statutory Good Time; Recommend a Disciplinary Transfer.

VII. REASON FOR SANCTION OR ACTION TAKEN

Attempting to give anything of value to another is in violation of the rules and regulations of the institution. Previously imposed sanctions for similar offenses have failed to effect a positive change in inmate Farmer's institutional behavior and attitude, therefore, it is felt by the DHO that the recommendation for a disciplinary transfer is warranted.

VIII. APPEAL RIGHTS: XXX The inmate has been advised of the findings, specific evidence relied on, action and reasons for the action. The inmate has been advised of his right to appeal this action within 20 calendar days under the Administrative Remedy Procedure. A copy of this report has been given to the inmate. CENTRAL FILE

IX. Discipline Hearing Officer

Printed Name	/s/ Illegible Signature	1/26/89 Date

Delivered to Inmate: 1-31-89 /s/ Illegible

Progress Report

U.S. Department of Justice

Federal Bureau of Prisons

FCI, Oxford, WI (institution) — Jan. 31, 1989 (Date)

If you have a presumptive parole date, any IDC actions referred to in this report will be considered by the U.S. Parole Commission as a basis for possible rescission of your parole date. You may present documentary evidence (including voluntary statements of witnesses) in mitigation of your misconduct, and you may request to review all disclosable documents that will be considered by the Commission.

Inmate Reviewed and/or Received Copy:

/s/ Illegible (Inmate's Signature) — 2/1/89 (Date) — Dennis Murphy (Staff Signature)

1. Type of Progress Report:

Initial: ___; Statutory Interim: ___; Pre-Release: ___

Transfer: XX; Other (specify): ___

2. Name: FARMER, Douglas

3. Reg. No: 23288-037

4. Age (DOB): 23 (05-03-65)

5. Present Security/Custody Level: 5/IN

6. Offense: Fraudulant Use Of Credit Cards

7. Sentence: 20 Years Regular Adult

8. Sentence Began: 08-05-86

9. Months Served: 29

10. Days EGT: 12

11. Days FGT/WGT: 134/50

12. Tentative Release: 06-28-2000

13. Last Commission Action/Date: None.

14. Detainers/Pending Charges: Sheriff's Office, Baltimore County, Towson, Maryland – 30 Year Consecutive State sentence following conviction for offenses of Theft and Attempted Theft.

15. Co-defendants: CAMPBELL, Lowell W.; HARDIN, Ronald; CORNISH, Keith D.; LEWIS, Clara C.

Distribution: Original – Inmate File; Copies to U.S. Probation Office, Parole Commission Regional Office, Inmate

PHOTO-COPY COMPLETED FORM AS NECESSARY

16. SUMMARY OF PRIOR PROGRESS REPORTS:

Farmer's previous progress report was prepared for transfer purposes and it reflected the initial 15 months of this period of incarceration. During that time, it appears that Farmer did not maintain employment nor did he participate in any self-improvement programs. Further, he received numerous incident reports. Specifically, Farmer was initially designated to the USP, Lewisburg, Pennsylvania where he was received on November 7, 1986.

Little information is available regarding his progress at that institution and it appears that he spent a majority of his stay at that institution in Administrative Detention. On May 13, 1987, Farmer was received at the FCI, Petersburg, West Virginia. While at that institution, Farmer was in the detention unit a good deal of time and as a result, he did not maintain employment nor did he participate in any self-improvement programs. Generally, he did not maintain open relationships with various staff members. Further, he received numerous incident reports. During 1986, Farmer was found to be guilty of Unauthorized Use of the Mail or Telephone and Unauthorized Contact With The Public. During 1987, Farmer was found to be guilty of Possession of Anything Not Authorized (two counts); Possession, Introduction or Use of Any Narcotic; Failing To Follow Safety or Sanitation Regulations; Counterfeiting, Forging or Unauthorized Reproduction of Any Document; Attempted Stealing (three incidents); and Unauthorized Use of the Mail or Telephone. Sanctions imposed for these infractions include placement in Disciplinary Segregation and the forfeiture/withholding of Statutory Good Time. Because of his misconduct, Farmer was redesignated to the FCI, Oxford, Wisconsin for disciplinary purposes, where he was received on January 27, 1988.

17. NEW INFORMATION:

There is no new information to report regarding current offense, prior record or social situation.

18. INSTITUTIONAL ADJUSTMENT:

A. *Program Plan*: Farmer met with members of his Unit Team for purposes of reclassification on February 16, 1988. Goals established at that time include, securing employment with UNICOR, participating in the Post-Secondary Education Program and participating in both individual and group counseling programs. Since establishing these goals, some progress has been made toward their achievement as outlined in this report.

B. *Work Assignments:* Shortly after his arrival at this institution during January 1988, Farmer secured employment with the institution's Labor I Crew. While assigned to this area, be received average work reports. During September 1988, Farmer elected to accept preferred employment with UNICOR's Electric Cable Factory. He was assigned to this area for approximately two months at which time he was placed in Administrative Detention. No work reports are available regarding his progress with UNICOR.

C. *Educational/Vocational Participation:* Records indicate that Farmer has completed the requirements for his high school equivalency diploma. During September 1988, Farmer enrolled in the Post-Secondary Education Program but was precluded from finishing the semester due to his placement in Administrative Detention.

D. *Relationship with Staff:* At past program reviews, Farmer received favorable quarters reports. Discussions with Unit Officers indicate that he is a cooperative individual but yet one who warrants closer supervision. Farmer's relationships with members of his Unit Team are considered to be positive.

E. *Incident Reports:*

DHO

Date	Charge	Disposition
04-04-88	Poss., Introd., or Use of Any Narcotics (109A); Lying or Providing A-False Statement to a Staff Member (313); Counterfeiting or Forging (314)	FF 45 days SGT; 30 days D/S (suspend pending one year clear conduct).
05-25-88	Giving Money or Anything of Value to, or Accepting Money or Anything of Value From, Another Inmate (328A)	15 days D/S; FF 10 days SGT.

08-01-88	Stealing (219); Insolence (312)	FF 10 days SGT; suspend telephone privileges for one year; 15 days D/S; recommend disc. transfer (suspend pending one year clear conduct).
01-20-89	Giving Money or Anything of Value to, or Accempting [sic] Money or Anything of Value From, Another Inmate (328A)	15 days D/S; FF 15 days SGT; recommend disc. transfer.

F. *Community Programs:* During this period of incarceration, Farmer has not participated in any community programs, furloughs or trips.

G. *Institutional Movement:* Farmer was initially designated to the USMCFP, Springfield, Missouri for purposes of medical treatment. He was received at that institution on August 15, 1986. Following the completion of medical treatment, Farmer was designated to the USP, Lewisburg, Pennsylvania where he was received on November 7, 1986. It was determined that the environment at Lewisburg was not safe for Farmer and as a result, he was redesignated to the FCI, Petersburg, West Virginia where he was received on May 13, 1987. On January 27, 1988, Farmer

was received here at the FCI, Oxford, Wisconsin for disciplinary purposes.

H. *Physical and Mental Health*: Farmer appears to be a fully employable individual who has not experienced any serious physical or emotional problems during this period of incarceration. He is currently classified as "regular duty status" with the restrictions that he not work in the Food Service Department, not lift weight more than 20 pounds and not be required to stand for a prolonged period of time.

I. *Progress On Financial Plan*: Farmer has paid $45.30 of the $100 special assessment fee imposed by the sentencing court.

19. *RELEASE PLANNING:*

Because of the length of time he has yet to serve, specific release plans have not been formulated. Most probably, Farmer will return to the Baltimore, Maryland area where he has spent most of his life.

A. *Residence:* To be determined.

B. *Employment:* To be determined.

C. *U.S.P.O.:* David E. Johnson
Chief U. S. Probation Officer
Room 6.100 U. S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201-2669

21. Dictated by: /s/ Dennis M. Kurzydlo 01-31-89
Dennis M. Kurzydlo, Case Manager
Date

22. Reviewed by: /s/ Dennis Head 2/1/89
Dennis Head, Unit Manager Date

DMK:lg

UNITED STATES GOVERNMENT
memorandum

Federal Correctional Institution
Oxford, Wisconsin 53952-0500

DATE:February 6, 1989

REPLY TO
ATTN OF: E. J. Brenna, Warden

SUBJECT: Request for Transfer

TO: L. E. DuBois, Regional Director

ATTN: N. W. Smith, Correctional Services Administrator

1. Name and Reg. No. FARMER, Douglas #23288-037

2. Rationale for Redesignation: As the attached documents indicate, Farmer became involved in an incident in this institution during November 1988 which involved his use of the telephone to attempt to give another inmate something of value. This incident is strongly suspected of involving other infractions such as abusing the telephone, violating a previous sanction of suspended telephone privileges and intent to commit fraud. This incident represents Farmer's fourth incident report since his arrival at this institution during late January 1988. The DHO has recommended that Farmer be transferred for disciplinary purposes. Members of his Unit Team all concur with this recommendation and believe that Farmer requires the security and supervision offered at a Penitentiary.

3. Propose Transfer Code: 309 - disciplinary

4. CIM Assignment: Farmer is not a Central Inmate Monitoring case.

5. Release Destination: Baltimore, Maryland

6. Institution(s) Recommended: USP, Leavenworth, Kansas

7. Mode of Transportation: Prison bus.

8. Medical Status: Farmer is presently classified as "regular duty status" with some limitations.

9. Does the inmate concur with the transfer? N/A

10. Additional Pertinent Information: Farmer is presently in Disciplinary Segregation and is pending a DHO hearing for the infraction of Engaging In A Sexual Act.

Prepared by: /s/ Dennis Kurzydlo
Dennis Kurzydlo, Case Manager - Sauk Unit

Reviewed by: _____
Dennis Head, Unit Manager - Sauk Unit

Reviewed by: _____
J. R. Cowan, CIM Coordinator

FACILITY BY REGION AND LEVEL OF SECURITY AND CUSTODY

SECURITY LEVEL	NORTHEAST	SOUTHEAST	NORTH CENTRAL	SOUTH CENTRAL	WESTERN	CUSTODY
1	Allenwood Danbury Camp Lewisburg Camp Petersburg Camp	Eglin Maxwell Lexington Atlanta Camp	Leavenworth Camp Marion Camp Terre Haute Camp Duluth Oxford Camp	Ft. Worth Big Spring La Tuna Camp El Reno Camp Texarkana Camp	Lompoc Camp Boron	OUT COMMUNITY
2	Danbury Loretto (SL 1 & 2)	Tallahassee	Sandstone	La Tuna, Seagoville	Safford	IN, OUT COMMUNITY
3	Raybrook Otisville	Ashland	Milan* Springfield Gen. Pop (SL-2 & SL-3)	Texarkana	Terminal Island*	IN, OUT COMMUNITY
4	Petersburg	Memphis* Talladega*	Oxford Terre Haute	Bastrop* (SL-3 & SL-4) El Reno	Phoenix	IN, OUT
5	Lewisburg		Leavenworth		Lompoc	MAXIMUM IN
6			Marion			MAXIMUM IN
Administrative Facilities	Alderson Morgantown (YCA) New York	Atlanta (INS Detention) Butner Miami	Chicago Springfield (Medical & Psychiatric) Rochester		Englewood (YCA) Pleasanton San Diego Tucson	ALL CUSTODY LEVELS

* Also has a Jail Unit.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 91-C-716-S

(Caption Omitted In Printing)

DEFENDANT KURZYDLO'S RESPONSE TO PLAINTIFFS FIRST SET OF INTERROGATORIES

1. *QUESTION:* Please state your full name, current place of employment and current position.

ANSWER: Dennis M. Kurzydlo. I am currently employed as a Unit Manager for the Federal Correctional Institution (FCI), Oxford, Wisconsin.

2. *QUESTION:* During the plaintiff's confinement at FCI Oxford what was your relationship to her, if any? (if there was inmate-prison official relationship, please state date upon which it began)

ANSWER: During plaintiffs' confinement at FCI-Oxford, I was assigned as his Case Manager. To the best of my recollection, I was inmate Farmer's Case Manager since the latter part of 1988.

3. *QUESTION:* Did there come a time when you recommended or initiated a transfer of the plaintiff? (if so, describe the manner in which such was performed, describing all documents relevant thereto).

ANSWER: On January 20, 1989, the Disciplinary Hearing Officer at FCI, Oxford, Wisconsin found plaintiff to be guilty of the infraction of Attempting to Give Money or Anything of Value to Another Inmate. One sanction imposed was that a recommendation be made to the Bureau of Prisons, North Central Regional Office for a

disciplinary transfer. As plaintiff's case manager, I was responsible for preparing a Progress Report and transfer memorandum. The Progress Report is a comprehensive report of the inmate's progress while incarcerated. The transfer memorandum provides a rationale for redesignation not found in the Progress Report. Along with these, I compiled a packet which included copies of documents relating to the incident, a copy of plaintiffs Presentence Investigation Report and copies of his classification material.

4. *QUESTION:* If your answer to interrogatory 3 is in the affirmative, please state the person(s) which you sent or otherwise referred the plaintiffs' transfer packet to for review, approval, etc.)

ANSWER: I sent the plaintiff's transfer packet to Unit Manager Dennis Head for review.

5. *QUESTION:* If your answer to interrogatory 3 is in the affirmative, please state if in recommending or considering plaintiff for transfer did you consider or include information relevant to the plaintiff's transsexualism? (if your answer is in the affirmative state what information was included, if your answer is to the negative, state the reasons you did not include such information)

ANSWER: Object to the form of the question as being vague and ambiguous. It is not clear whether the question being asked is if the transfer was based on plaintiff's transsexualism, or if plaintiff's transsexualism was known to me at the time of the recommendation.

6. *QUESTION:* Does the Bureau of Prisons policies take into account a fact that an inmate may be or is a transsexual with regard to designation? (if yes, identify the policy completely)

ANSWER: An inmate's overt sexual affectation is considered in determining a place of confinement, but this is only one of many more dominant factors. In most instances, this issue can be managed at the institutional level.

7. *QUESTION:* In your submissions for the plaintiffs' transfer did you recommend that the plaintiff be placed in a penitentiary?

ANSWER: Yes, I recommended USP, Leavenworth, Kansas, because it was a security level "5" institution.

8. *QUESTION:* If your answer to interrogatory 7 is in the affirmative, state the "specific" reasons why you believe the plaintiff should have been confined in a penitentiary?

ANSWER: I believed the plaintiff should have been confined in a security level "5" penitentiary and not just any penitentiary or FCI because plaintiff had been given two opportunities to function in a Security Level "4" institution, but became a management problem due to his failure to abide by the rules at both institutions. A computation of his security needs based on Bureau of Prisons's policy at that time, indicated that plaintiff required the security offered in a security level "5" institution.

9. *QUESTION:* What precisely can the penitentiary offer with regard to the confinement of the plaintiff that could not be provided in an FCI such as Oxford?

ANSWER: Not all penitentiaries can necessarily offer anything with regard to the confinement of the plaintiff that could not be provided in an FCI such as Oxford, however, the security level "5" institution at USP Leavenworth, Kansas, was designed to have greater security measures and a greater staffing ratio than FCI-Oxford.

10. *QUESTION:* Do you believe or know of the federal penitentiaries' to house violent or non-violent offenders?

ANSWER: I believe all secure institutions have a combination of both violent and non-violent offenders.

11. *QUESTION:* In your review of the plaintiffs' records and/or based on the facts known to you about the plaintiff would you contend the plaintiff to be violent or non-violent person?

ANSWER: Object to the form of the question as being vague and ambiguous as it is not clear what plaintiff means by the terms violent or non-violent person.

12. *QUESTION:* Do you consider the plaintiff to be an effeminate individual?

ANSWER: Object to the form of the question as being vague and ambiguous as plaintiff's definition of effeminate individual is unclear.

13. *QUESTION:* If your answer to interrogatory 12 is in the affirmative state if you believe such would jeopardize the plaintiffs' safety in a penitentiary environment?

ANSWER: Not applicable.

14. *QUESTION:* What position did you hold prior to your current employment?

ANSWER: My prior position with the Bureau of Prisons was as a case manager.

15. *QUESTION:* Have you ever been convicted or arrested for a crime?

ANSWER: Object to the form of the question, as this request does not comply with Rule 609, Federal Rules of Civil Procedure.

I have read the answers to Plaintiff's First set of interrogatories prepared on my behalf. I declare under penalty of perjury pursuant to 28 U.S.C. 1746, that they are true and correct to the best of my knowledge.

/s/ Dennis M. Kurzydlo
Dennis M. Kurzydlo
Former Case Manager
FCI, Oxford, Wisconsin

Dated this 1st day of November, 1991.

Respectfully submitted,

KEVIN C. POTTER
United States Attorney

/s/ J.B. Van Hollen
BY: J.B. VAN HOLLEN
Assistant U.S. Attorney
Federal Courthouse
Room 420
120 N. Henry Street
Madison, WI 53703

(Certificate Of Service Omitted In Printing)

Dee Farmer
Register Number 23288-037
United States Medical Center
for Federal Prisoners'
Post office Box 4000
Springfield, Missouri 65808

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

(Caption Omitted In Printing)

Civil Action No. 91-C-716-S

DECLARATION OF DEE FARMER

I, Dee Farmer, hereby declare and state as follows:

1. From January, 1988 to March 9, 1989 I was a inmate confined at the Federal Correctional Institution (FCI), Oxford, Wisconsin. During, my confinement at FCI-Oxford I submitted administrative remedies to Defendants BRENNAN, and DUBOIS that specifically concerned my transsexualism. Defendants KURZYDLO and BRENNAN was also aware of my transsexuality through records in my Central File maintained by them and their personal observation of me on a regular basis. Defendant Smith was aware of my transsexuality through the transfer packet sent to him by Defendant Kurzydlo, well as documents sent by the Associate Warden of FCI-Oxford in February, 1989.

2. With regard to their personal involvement in the designation and placement of me at USP-Terre Haute where I was sexually assualted, [sic] each of them contributed to the designation by ignoring Bureau of Prisons policy that requires ordinarily for transsexual offenders to be housed in co-correctional institutions. Nevertheless,

they either directly participated in the transfer or permitted it to occur knowing the risk that I would be subjected to.

3. During Defendant DUBOIS and SMITH employment with the Bureau of Prisons North Central Office they had frequent contacts with FCI-Oxford which were continous [sic] and systematic throughout their employment in said Region. Specifically, Defendant DUBOIS handled all administrative remedies and controlled housing matters arising out of FCI-Oxford. While Defendant SMITH handled every transfer of disciplinary nature arising out of FCI-Oxford. Though, Defendants DUBOIS and SMITH had other responsibilities that required them to have contact with FCI-Oxford these duties alone required continous [sic] contact.

4. I have no knowledge of the manner in which the summons and complaint was served on any other defendants. As a pro'se plaintiff I filed my complaint with the Court and the Court instructs' the U.S. Marshals' to conduct service of process. To the best of my knowledge, the type of service generally conducted by the U.S. Marshal's is sufficient and accordance with law.

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Dee Farmer
DEE FARMER

12-3-91

Dee Farmer
Register Number 25288-037
United States Medical Center
for Federal Prisoners'
Post Office Box 4000
Springfield, Missouri 65808

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

(Caption Omitted In Printing)

Plaintiffs' First Amended Complaint for Damages and Injunctive relief

Civil Action
No. 91-C-716-S

I.

INTRODUCTION

1. Plaintiff is a prisoner of the United States of America serving a twenty (20) year term of commitment in the custody of the Attorney General of the United States. She is presently incarcerated at the United States Medical Center – Springfield, Missouri. Plaintiff is a pre-operate [sic] male-to-female transsexual (although plaintiff is a genetic or biologic male, plaintiff will for the purposes of this action, be referred to herein in the feminine pronoun.) Essentially this complaint rests upon a claim that her constitutional and civil rights have been at all times mentioned herein violated by the defendants, due to their deliberate indifference to her saftey, [sic] arising from their inappropiate [sic] classification, designation and housing of her, as a transsexual, in a penitentiary that has a violent environment, knowing such would

endanger her life and indeed did result in her being harass, [sic] threaten [sic] and sexually assualted. [sic]

II.

JURISDICTION

2. This is a civil action authorized by 28 U.S.C. § 1331 to redress the deprivation, under color of United States law, of rights secured by the Constitution and laws of the United States. Jurisdiction of this Court is also founded directly upon the Fifth and Eighth Amendment to the United States Constitution. Further, this Courts' jurisdiction of plaintiffs' claim for monatory [sic] damages is authorized by *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

3. This Courts' pendent jurisdiction is also invoked for violation of Wisconsin laws.

4. This Court has venue jurisdiction pursuant to 28 U.S.C. 1391(e) which authorize suit against federal official, acting under color of federal law, in his official capcity [sic] in any judicial district in which . . . a defendant resides. Defendant BRENNAN and KURZYDLO reside in the Western District of Wisconsin. The Court has personal jurisdiction of each defendant pursuant to 28 U.S.C. § 1391(b) inasmuch the actions complained of that are alleged to have occurred at the Federal Correctional Institution, Oxford, Wisconsin, are in or arose within this Courts' judicial district. Even though, there [sic] actions complained of that have allegedly occurred at other institutions in the Federal Prison System, said actions are consequences of the actions herein complained of arising

at the Federal Correctional Institution, Oxford, Wisconsin, within this Courts' judicial district.

III.

PLAINTIFF

5. Plaintiff DEE FARMER is, and at all times mentioned herein, was in the custody of the United States Bureau of Prisons, as a result of being committed to the custody of the Attorney General of the United States for a period of twenty (20) years for conviction of violation of 18 U.S.C. § 1029, under the provisions of 18 U.S.C. § 4205(b)(2). Plaintiff is of legal age and comptent [sic] to testify to the facts stated herein. She is currently incarcerated at the United States Medical Center for Federal Prisoners' – Springfield, Missouri, a facility of the Bureau of Prisons.

IV.

DEFENDANTS

6. Defendant J. MICHAEL QUINLIN is, and at all times mentioned herein was, the duly appointed Director of the United States Bureau of Prisons (hereinafter "the Bureau" or "the director") and maintains offices in Washington, D.C. Defendant QUINLAN daily promulgates rules, regulations, directives, and policies and executes the same through his agents and agents of the United States of America. Further at all times relevent [sic] herein, defendant QUINLAN executed the rules, regulations, directives and policies of the Bureau through his agents and agents of the United State [sic] of America.

Defendant QUINLAN has the ability to daily control or cause to be controlled the conditions and environment in which the plaintiff resides while incarcerated now or in the future within the Federal Bureau of Prisons' system.

7. Defendant QUINLAN is sued in his official capacity only as Director of the Federal Bureau of Prisons. At all times mentioned in this complaint defendant QUINLAN acted under color of United States law.

8. Defendant CALVIN EDWARDS is, and at all times mentioned herein, was North Central Regional Director of the Federal Bureau of Prisons (hereinafter "Regional Director" or "EDWARDS"), the Warden of the United States Penitentiary (hereinafter "USP" or "penitentiary") in Lewisburg, Pennsylvania or Terre Haute, Indiana. Further at all times relevent [sic] herein Defendant EDWARDS daily was or is responsible for the management of USP-Lewisburg, Pennsylvania, USP-Terre Haute, Indiana or Bureau institutions and programs within the North Central Region and for such other duties as may be delegated by the Bureaus' Central Office in Washington, D.C. Defendant EDWARDS has the ability to daily control or cause to be controlled the conditions and environment in which plaintiff resides while incarcerated in the Federal Bureau of Prisons system.

9. Defendant EDWARDS is sued in his official capcity [sic] only as Regional Director and Former Warden of USP-Terre Haute, Indiana and USP-Lewisburg, Pennsylvania. At all times mentioned in this complaint defendant EDWARDS acted under color of United States law.

10. Defendant EDWARD BRENNAN is, and at all times mentioned herein was, Warden of the Federal Correctional Institution, Oxford, Wisconsin 53952. Defendant BRENNAN daily had the ability to directly control or cause to be controlled the conditions and environment in which plaintiff resided or was transferred to while incarcerated at FCI-Oxford.

11. Defendant BRENNAN is sued in his individual capcity [sic] as well as his capcity [sic] as Warden of FCI-Oxford. At all times mentioned in this complaint, Warden BRENNAN acted under color of United States law.

12. Defendant DENNIS KURZYDLO is, and at all times mentioned herein was, Case Manger [sic] at FCI-Oxford (hereinafter "Case Manger [sic] KURZYDLO" or "KURZYDLO") and maintains his office at FCI-Oxford, Wisconsin 53952. Defendant KURZYDLO daily is responsible for the case management operations of inmates delegated to him by or through Warden BRENNAN, FCI-Oxford, Wisconsin. Defendant KURZYDLO had the ability to daily control or cause to be controlled, either directly or indirectly, the conditions and environment which the plaintiff resided or was transferred to while incarcerated at FCI-Oxford.

13. Defendant KURZYDLO is sued in his individual capcity, [sic] as well as in his official capcity [sic] as Case Manger. [sic] At all times mentioned in this complaint, Defendant KURZYDLO acted under color of United States law.

14. Defendant LARRY E. DUBOIS was at all times mentioned herein, North Central Region Regional Director of the Federal Bureau of Prisons (hereinafter "Former

Regional Director" or "DUBOIS"), and maintained his office at 10920 Ambassador Drive, Air World Center, Kansas City, Missouri 64153. Further, at all times relevent [sic] herein Defendant DUBOIS daily was responsible for the management of Bureau institutions and programs within the North Central Region and for such other duties as may have been delegated by the Bureau's Central Office in Washington, D.C. Defendant DUBOIS had/ has the ability to daily control or cause to be controlled the conditions and environment in which plaintiff resided or was transferred to while incarcerated in Bureau's institutions within the North Central Region.

15. Defendant DUBOIS is sued in his individual capcity [sic] as well as his official capcity [sic] as Former North Central Region Regional Director of the Federal Bureau of Prisons. At all times mentioned in this complaint, Defendant DUBOIS acted under color of United States law.

16. Defendant N.W. SMITH was at all times mentioned herein Correctional Services Administrator (hereinafter "Former Administrator" or "SMITH") and maintained his office at 10920 Ambassador Drive, Air World Center, Kansas City, Missouri 64153. Defendant SMITH daily was responsible for the designations of inmates within the Bureaus' North Central Region institutions. Defendant SMITH had the ability to control or cause to be controlled the conditions and environment in which plaintiff resided or was transferred to while incarcerated in Bureau's institutions within the North Central Region.

17. Defendant SMITH is sued in his individual capcity [sic] as well as his official capcity [sic] as Former Administrator. At all times mentioned in this complaint, Defendant SMITH acted under color of United States law.

V.

STATEMENT OF FACTS

A.

Plaintiffs' Transsexualism

18. Plaintiff is a biologic male whom at an early age began to identify more with the female gender. Her childhood is remarkable for feminine interest and mannerisms with a dislike for male orientated activities.

19. By the age of fifteen (15) years old, plaintiff overtly began to demonstrate her obsession with the female gender. Specifically, she began to live in the female gender, full-time, by dressing and conducting herself, thoroughly and consistently as a female.

20. In attempt to further disassociate herself with the male gender and in persuit [sic] of Sex Reassignment Surgery, plaintiff without psychological counseling or medical consultation, illegitimately had unsuccessful scrotal surgical procedure in 1980 on the black market in New York City.

21. In 1984, plaintiff entered the New York Breast Clinic where she had silicone (base) injections and hormone treatment. Plaintiff had been on Premarin, a female hormone for several years prior to her arrest.

22. Upon her commitment to the Bureau of Prisons, plaintiff continued to be obsess [sic] with ridding herself of her primary male sex-organs and features and obtaining those of the female gender. This fact is evident from the numerous administrative and judicial complaints, the plaintiff has filed with appropiate [sic] offices' of the Bureau, including the named defendants', as set forth hereinafter.

23. Moreover, plaintiff has on several occasions introduced female hormones into the Bureau of Prisons institutions and consumed the same without medical supervision. Also, plaintiff has been disciplined by prison officials, Federal Bureau of Prisons for attempting to introduce Premarin, female estrogen into Bureau institutions without authorization.

24. Plaintiffs' complexities related to her transsexualism has only been magnified during her commitment in Bureau institutions, within the last year plaintiff has indicated to employees of the Bureau, her desire and intentions to perform self-castration.

25. The aforementioned facts are those recognized by the American Psychiatric Association and the Harry Benjamin International Gender Dysphoria Association as constituting the diagnosis of transsexualism, a mental disorder. Consistent, with recognized standards qualified professionals diagnosed the plaintiff as a transsexual prior to incarceration and even after her commitment, the Bureau's medical and psychiatric personnel also diagnosed and documented the plaintiff as a transsexual.

26. Records compiled and maintained by the Bureau of Prisons also describe the plaintiff as a non-violent,

passive individual who projects feminine characteristics, both mentally and physically. It is further noted, that she is likely to experience a number of difficulties in incarceration. Because of her youth and feminine appearance she is likely to experience a great deal of sexual pressure.

27. Each of the facts stated in paragraphs 18, 19, 20, 21, 22, 23, 24, 25 and 26 were known to Defendants EDWARDS, BRENNAN, KURZYDLO, DUBOIS and SMITH at the times of their alleged actions or inactions resulting in the alleged violations complained of herein, as setforth hereinafter in full and detail, respectively.

B.

Failure to Ensure Saftey [sic] of Plaintiff, as a Transsexual

28. Though, there are few transsexual offenders committed to the Federal Bureau of Prisons, it is a documented fact that transsexuals present a unique management problem in a correctional setting. Case law and correctional records reveal that the placement of pre-operative male-to-female transsexuals in an all male institution has resulted in them being threaten [sic] and sexually assualted [sic] by fellow inmates and prison guards. Irrespective of the extent of their feminine appearance, said transsexuals become the target of sexual approaches from fellow inmates, because of their feminine interest and characteristics which often leads to them being raped and abused. The greater said transsexual appearance, characteristics, interest and mannerisms are to the female gender the probability of sexual assualt [sic] increases' and in most instances is inevitable.

29. Upon information and belief, the environment of the institution is one of the most substantial aspects in determining the probability that said transsexual will be able to safely function within the institution. As institution with a violent environment is one where said transsexual will inevitably be raped. A violent environment in a penal setting would be one composed of prisoners with serious prior convictions, violent and drug related crimes and prison disciplinary infractions and substantial sentences of imprisonment.

30. Bureau of Prisons, Health Service Manual, 6000.2, Section 6805 entitled Transsexuals, provides that transsexuals will ordinarily be placed in co-correctional facilities. The method by which they are intergrated [sic] into the correctional setting will be determined by Institution Supplement.

31. However, inmates designations are determine [sic] by Bureau of Prisons, Security and Custody Classification Manual which set forths the guidelines for determining inmates security and custody level and assigns certain levels to each institution, except for institutions designated as administrative. At all times mentioned herein the Bureau of Prisons institutions were assigned security levels 1-6 and custody levels of in, out and max. Security level 1 was the less restrictive and 5 the highest, per say [sic]. Inasmuch their [sic] is only one level 6 institution, United States Penitentiary, Marion, Illinois. With regard to custody levels out is the lowest in medium and max highest. This policy has no provisions for the designation of transsexual offenders.

32. Currently, Bureau of Prisons Security and Custody Classification Manual devides [sic] institutions into the categories of low, medium and high, well as administrative. It continues the Bureaus' previous provisions regarding custody levels. This latest policy is also viod [sic] of any provision regarding the designation of transsexual offenders.

33. Neither, Bureau of Prisons Security and Custody Classification Manuals referenced the provisions of Bureau of Prisons Health Service Manual regarding transsexual offenders ordinarily being placed in co-correctional facilities.

34. Defendant QUINLAN, at all times mentioned herein disregarded his responsibility to establish an effective policy on the housing and designation of transsexual offenders. He also failed to enfore [sic] existing Bureau policy regarding transsexual or ensure observance or adherence thereto.

35. Defendants' EDWARDS, BRENNAN, KURZYDLO, DUBOIS and SMITH failed to adhere, consider or observe the Bureaus' policy regarding transsexual offenders' in designating and transferring the plaintiff.

C.

COMMITMENT TO BUREAU OF PRISONS

36. On or about August 14, 1986 United States Marshals' transported the plaintiff to the United States Penitentiary in Lewisburg, Pennsylvania, and than [sic] on the following day to the United States Medical Center for

federal Prisoners' in Springfield, Missouri. During her overnight stay at USP-Lewisburg, plaintiff was kept segregated in a hospital unit with other transsexual inmates, Tonett Johnson and Ralph Scott a/k/a Simone Scott.

37. Initially, plaintiff was completely segregated from other inmates at MCFP-Springfield in a segregation cell. Later, she was placed in a hospital unit where she was only allowed to interact with the inmates, whom were seriously ill and hospitalized on said unit, 3-2, never was she permitted to enter the general population.

38. The restrictions imposed upon the plaintiff as described in paragraphs 36 and 37 herein, was imposed solely because of plaintiffs' transsexualism as described in paragraphs 18, 19, 20, 21, 25 and 26 and Bureau officials belief that said facts warranted greater protection to ensure the plaintiffs' saftey [sic].

39. On August 22, 1986 a psychological report was prepared by Bureau's psychologist at MCFP-Springfield documenting plaintiffs' transsexualism. The psychologist noted that the plaintiff would likely experience a number of difficulties during her incarceration, including a great deal of sexual pressure because of her youth and feminine appearance.

40. On August 19, 1986 a history and physical was prepared by Bureaus medical doctor at MCFP-Springfield stating that the plaintiff apparently began at age 16 to identify more as a female, had some type of scrotal surgical procedure in 1980 and has been on Premarin (female hormone) for the past year.

41. On or about September 1, 1986 a Transfer Request was sent to the Bureau's North Central Region contending that the plaintiff has a predisposition to transsexuality and recommended she be transferred to USP-Lewisburg.

42. Each of the facts stated in paragraphs 39, 40 and 41 were known to Defendants' EDWARDS, BRENNAN, KURZYDLO, DUBOIS and SMITH at the times of their alleged actions or inactions resulting in the alleged violations complained of herein, as set forth hereinafter in full and detail, respectively.

D.

TRANSFER TO USP-LEWISBURG

43. On October 17, 1986 the plaintiff was transferred from MCFP-Springfield and placed enroute to her newly designated institution, USP-Lewisburg. On the same date, she was placed in holdover status at the Federal Correctional Institution (FCI), Elreno, Oklahoma. Based on the facts as described in paragraphs 18, 19, 20, 21, 25 and 26 herein Bureau officials at FCI-Elreno segregated the plaintiff in a hospital cell.

44. Bureau officials at FCI-Elreno prepared an administrative detention order contending that the plaintiffs' presence in the general popolution [sic] would pose a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution because of her transsexualism.

45. On November 7, 1986 the plaintiff was removed from administrative segregation of FCI-Elreno and transported to her designated institution, USP-Lewisburg. Upon her arrival at USP-Lewisburg Bureau officials prepared an administrative detention order that states: Inmate Farmer is a transsexual who is 21 years old, designated to Lewisburg. Accordingly, due to the nature of his (SIC) case he (SIC) was placed on Addt. (administrative detention) pending review by the I.D.C. prior to placement in population.

46. During, plaintiffs entire stay at USP-Lewisburg she remained administratively segregated for the reasons aforementioned. Furthermore, while at said penitentiary plaintiff remained on a status commonly known as "Total Single or T/S" which means essentially she was never permitted to come into physical contact with any other inmate.

47. USP-Lewisburg is, and at all times mentioned herein was, a security level 5 (five) institution, housing aggressive and violent offenders. Moreover, said penitentiary has a history of assualts [sic], murders, drugs, etc. which compose a violent environment.

48. On December 18, 1986 an administrative remedy response was prepared for Defendant EDWARDS (than [sic] Warden, USP-Lewisburg) stating: It has been determined by the administration that in order to afford you all possible means of protection, you will be housed on total single status. The decision to transfer you to another facility was based upon a determination, that there is a high probability that you cannot safely function at this institution.

49. In an interview with Bureau employee, John E. Williams, (than [sic] Chief Correctional Supervisor at USP-Lewisburg) it was explained to the plaintiff that because of her feminine appearance, if she were to enter the general population inmates would put a knife to her throat and force her to do whatever they wanted, because she was the closes [sic] thing, they have or would come in contact with for a very long time, to a woman. Therefore, it was necessary to keep her separated from all other inmates.

50. A medical summary was prepared at USP-Lewisburg which claimed that the plaintiffs' last dosage of Premarin (illegally and without authorization) had been one month earlier and pertinent physical examination findings included some decrease in facial hair and rearrangement of body fact [sic] to a female distribution.

51. The decision not to permit the plaintiff to enter the population of USP-Lewisburg because of her transsexuality is set-forth in the case Farmer v. Carlson, 685 F.Supp 1335 (M.D. Pa. 1988) and is incorporated herein as though setforth in full and detail.

52. Bureau officials were aware that the plaintiff had successfully operated a credit-card fraud organization while in the custody of state and federal authorities and though serving a twenty year federal sentence and a consecutive thirty year state sentence, this had not deterred her from continuing to engage in these activities.

53. Additionally, plaintiff received two disciplinary reports at USP-Lewisburg, 1) Code 406, Unauthorized Use of the Mail, for writing the Federal Reserve Bank under the Bureaus' legal mail provisions, and 2) Code

327, Unauthorized Contact with the Public, for attempting to obtain a credit-card number via telephone. Noteworthy, plaintiff received one disciplinary report at MCFP-Springfield, Code 327, *supra.* for operating illegal credit-card business through the inmate telephone.

54. Irrespective of these facts, after spending about five months in administrative segregation on or about March 17, 1987 the plaintiff was redesignated and transferred to the Federal Correctional Institution (FCI), Petersburg, Virginia.

55. Defendants' QUINLAN, EDWARDS, BRENNAN, KURZYDLO, DUBOIS and SMITH is, and at all times mentioned herein were aware and knowledgable [sic] of the facts setforth in paragraphs 43, 44, 45, 46, 47, 50, 51, 52, 53 and 54 during the time of their individual actions or inactions as setforth herein resulting in the alleged violations complained of hereinafter.

E.

TRANSFER TO FCI-PETERSBURG

56. On March 17, 1987 the plaintiff arrived at FCI-Petersburg. She was placed in administrative segregation because of her transsexuality and pending initial classification by her assigned Unit Team.

57. At all times mentioned herein FCI-Petersburg was a level four security level institution and housed a low percentage of offenders with a history of violence or aggressive behavior.

58. Though, plaintiff was permitted in the general population at FCI-Petersburg she spent the majority of

her stay at said institution in segregation for allegedly committing disciplinary infractions, as described hereinafter.

59. During the plaintiff periodic housing in the general population she was constantly subject to harassment, threats and sexual pressure. Further, on atleast [sic] three occassions [sic] she was forced to engage in sexual acts with fellow inmates.

60. On numerous occassions [sic] plaintiff sought psychological assistance for the harassment and sexual pressure she was experiencing in the general population at FCI-Petersburg. However, she did not report the aforementioned sexual assualts [sic] to prison officials in fear of retailiation [sic] by said inmates.

61. While at FCI-Petersburg plaintiff received five incident reports involving indirectly or directly credit-card fraud via telephone. These disciplinary infractions included fraudulently ordering 1) hair relaxer; 2) ladies sweat clothing; 3) ladies watch; and 4) ladies eyeglasses, well as attempting to obtain a credit-card number via telephone.

62. She also received disciplinary infractions for 1) having her saftey [sic] shoes off; 2) wearing her T-shirt in a female fashion (off one shoulder) which officials claimed exposed a portion of her "breast."; 3) attempting to introduce female hormones into the institution, and 4) writing a letter to another inmate without authorization, well as unauthorized reproduction of document which also concerned her transsexualism.

63. As setforth above none of the disciplinary infractions allegedly committed by the plaintiff involved violent or aggressive behavior. Furthermore, many involved issues' which directly relate to plaintiffs transsexuality.

64. Due to the aforementioned disciplinary infractions plaintiff was transferred to the federal Correctional Institution (FCI) Oxford, Wisconsin.

65. At all times mentioned herein Defendants EDWARDS, BRENNAN, KURZYDLO, DUBOIS and SMITH were award and knowledgable [sic] of the facts stated in paragraphs 56, 57, 58, 60 61, 62, 63 and 64 during the time of their individual actions or inactions complained of herein resulting in the alleged violations as setforth hereinafter.

F.

TRANSFER TO FCI-OXFORD

66. In January, 1988 plaintiff was removed from FCI-Petersburg and placed in hold-over status at USP-Lewisburg where she was segregated in a hospital cell for the reasons stated in paragraphs 45, 46, 47, 48 and 49 herein.

67. Subsequently, she was removed from USP-Lewisburg and transported to FCI-Elreno where she was administratively segregated as a hold-over for the reasons stated in paragraph 44 herein.

68. Likewise, plaintiff was removed from FCI-Elreno and transported to USP-Terre Haute where she

was administratively segregated as a hold-over for the reasons stated in paragraphs 28 and 29 herein.

69. Plaintiff was removed from USP-Terre Haute and transported to her designated institution, FCI-Oxford.

70. At all times mentioned herein FCI-Oxford was a security level four institution, however, it housed a medium percentage of inmates with histories of violence and aggressiveness.

71. Plaintiff was permitted to enter the general population at FCI-Oxford where she received a substantial amount of sexual pressure from other inmates, and atleast [sic] on one occasion was forced to engage in a sex act with another inmate.

72. Shortly after her arrival at FCI-Oxford plaintiffs' transsexualism was further documented to and by prison officials in a psychological questionaire [sic] and summary dated February 4, 1988.

73. On February 8, 1988 plaintiff filed an administrative remedy with Defendant BRENNAN in which she wrote: Farmer, a transsexual prior to her incarceration received psychological counseling for a sex-change at Johns' Hopkins University. Additionally, she received the medication of conjugated estrogen and had an unsuccessful operation on the blackmarket in New York City to have her testicles removed.

74. On February 18, 1988 Defendant BRENNAN acknowledged having received plaintiffs' complaint by denying the same and returning it to her.

75. On June 22, 1988 plaintiff filed another request for administrative remedy with Defendant BRENNAN concerning various issues' directly relating to her transsexuality.

76. On July 8, 1988 Defendant BRENNAN acknowledged reciept [sic] of plaintiffs complaint by denying the same and returning it to her.

77. On July 11, 1988 plaintiff appealed Defendant BRENNAN denial of her request for administrative remedy to Defendant DUBOIS who acknowledged the same by denying plaintiffs' appeal on August 12, 1988.

78. On February 12, 1988 plaintiff brought a civil action entitled *Farmer v. Edwin Meese, Michael QUINLAN E.J. BRENNAN, and Mr. Haas*, 88-C-110-S (W.D. Wis.) directly concerning her transsexuality. This action thorough advised Defendants QUINLAN and BRENNAN of the facts setforth in paragraph 51 herein.

79. Further, Defendants' BRENNAN and DUBOIS knowledge of plaintiff transsexuality is thoroughly documented in the case of *Farmer v. Haas*, 927 F.2d 607 (7th Cir. March 1, 1991) (Table, text available on WESTLAW).

80. On February 1, 1988 plaintiff received a disciplinary report of FCI-Oxford for attempting to introduce female hormones into the institution without authorization.

81. She also received three disciplinary reports that directly or indirectly involved credit-card fraud while confined at FCI-Oxford – 1) obtaining credit information via telephone; 2) fraudulently ordering flowers, and 3) a ladies watch.

82. Consequently, it was recommended that the plaintiff received a disciplinary transfer, pursuant thereto on February 6, 1989 Defendant KURZYDLO prepared a Request for Transfer for Defendant BRENNAN addressed to Defendant DUBOIS and SMITH recommending that the plaintiff be transferred to a maximum security penitentiary. Defendant KURZYDLO included a copy of plaintiffs' Pre-Sentence Investigation (PSI) Report which thoroughly documented her transsexuality, and a Progress Report that summarized her previous designations and transfers.

83. Defendant KURZYDLO, knew that the placement of the plaintiff in a penitentiary would not offer her any greater security or benefit her in any aspect.

84. Defendants' DUBOIS and SMITH caused or allowed the plaintiff to be redesignated to the United States Penitentiary in Terre Haute, Indiana knowing that said penitentiary has a violent environment, including a history of assaults, murders and rapes, and plaintiff, a feminine, male-to-female preoperative transsexual, life would be endangered if placed in the institutions' general population.

85. During the interim plaintiff received disciplinary reports for allegedly 1) engaging in a sex act; 2) writing another inmate, and 3) unauthorized possesion [sic] of a Motrin.

86. With regard to plaintiffs' disciplinary reports in a letter dated July 14, 1988 Niel Blumberg, MD. P.A. Diplomat American Board of Psychiatry, Neurology and Forensic Psychiatry wrote to prison officials at FCI-Oxford noting plaintiffs' diagnosis of transsexualism and

stating unless Ms. Farmer receives appropriate treatment for the above noted problems, it is unlikely that her involvement in criminal activities will cease.

87. On March 9, 1989 Defendant BRENNAN signed the Order for the plaintiff to be transferred to USP-Terre Haute knowing that plaintiff saftey [sic] would be endangered at said institution. Defendant BRENNAN also knew that USP-Terre Haute has a violent environment including a history of murders, assualts [sic] and rapes.

G.

TRANSFER TO USP-TERRE HAUTE

88. Plaintiff was received at the United States Penitentiary in Terre Haute, Indiana on March 9, 1989 and placed in administrative segregation, because of her transsexuality, and supposedly pending initial classification by her assigned Unit Team. On or about March 23, 1989 plaintiff was released into the general population at USP-Terre Haute and assigned to Unit 3M.

89. On April 1, 1989 an inmate entered the plaintiffs' cell and demanded that she engage in sexual intercourse with him and when she refused he attacked her, beating her in the face with his bare fist, than [sic] kicking her with his feet, revealing a home made knife he had stuck in his sneaker, finally the inmate began tearing the plaintiffs clothing and forcably [sic] raped her.

90. As a result of the sexual assualt [sic] upon plaintiff she suffered mental anguish, psychological damage, humilation [sic], a swollen face, cuts and bruises to her

mouth and lips and a cut on her back, well as some bleeding.

91. Plaintiff was threaten with being murdered if she informed prison officials of the rape and out of fright for her life she did not inform prison officials of the sexual assault until one week later when she was placed in detention. Plaintiff remained in detention until her departure from USP-Terre Haute.

H.

ENVIRONMENT OF USP-TERRE HAUTE

92. By Bureau of Prisons, Program Statement 5100.2 entitled Security Classifications and Designations USP-Terre Haute is a leve [sic] four institution. However, security levels are determined by points and generally have three spheres, (1) 4-low, (2) 4-med, and (3) 4-high. USP-Terre Haute was at the highest sphere of a level four. Inasmuch, USP-Terre Haute houses violent offenders level five inmates and maximum custody inmates.

93. Defendants QUINLAN, EDWARDS, BRENNAN, KURZYDLO, DUBOIS and SMITH is, and at all times relevant to the facts stated herein were aware that USP-Terre Haute is a penitentiary, with a violent environment, housing a majority of violent offenders with frequent incidents of assualts [sic], fights, weapons, drugs and sexual assualts [sic], well as a history of murders, weapons, drugs, sexual assualts [sic], etc.

94. Furthermore, Defendants QUINLAN, EDWARDS, BRENNAN, KURZYDLO, DUBOIS and SMITH knew that to place the plaintiff or any male-to-

female peroperative [sic] transsexual, who has a feminine appearance, presents themselves mentally and physically as female, has been administered female hormones and had began to prepare for Sex Reassignment Surgery would be sexually assualted [sic] at USP-Terre Haute, and through their actions or omissions permitted the plaintiff to be designated and housed at USP-Terre Haute.

95. Defendants QUINLAN, EDWARDS, BRENNAN, KURZYDLO, DUBOIS and SMITH knew that the plaintiff has no history of violence, has never been in anytype [sic] of physical confrontation or fight with inmate or staff and is a passive individual who could not function in the hostile and violent environment of USP-Terre Haute.

96. Defendants EDWARDS, DUBOIS and SMITH knew of the sexual assaults, fights, drugs, assaults of stabbing and piping, well as excessive alcohol in the population of USP-Terre Haute, through administrative remedies, disciplinary appeals and transfer request filed with them respectively.

97. Defendant EDWARDS was the Warden at USP-Terre Haute during plaintiffs incarceration there and though he was personally aware of her transsexuality well as the high probability she could not safley [sic] function at said institution he permitted her to enter the general population.

98. In addition, to being sexually assaulted at USP-Terre Haute plaintiff received a great deal of sexual pressure which continued even after her placement in detention.

VI

LEGAL CLAIMS

99. Plaintiff has been and at all times mentioned herein was denied her right to Due Process of law as guaranteed by the Fifth Amendment of the Constitution of the United States, by willful and knowing failure of Defendant QUINLAN to establish on effective policy on the designations and housing of transsexual offenders committed to the Bureau of Prisons as setforth more specifically in paragraphs 32, 33, 34 and 35.

100. Plaintiff has been and at all times mentioned herein and is being denied her right to Due Process of law as guaranteed by the Fifth Amendment of the Constitution of the United States by being improperly classified, designated and housed within the Federal Bureau of Prison system.

101. Plaintiff has been and at all times mentioned herein was denied her statutory right as protected by the Due Process Clause of the Fifth Amendment to the United States Constitution and her Eighth Amendment right to be free from deliberate indifference to her saftey [sic] by the Defendants failure to provide for her saftey [sic], protection and safekeeping as described more specifically in paragraphs 82, 83, 84, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, and 98. See also 18 USC 4042(2), (3).

102. As a proximate result of Defendants' QUINLAN, EDWARDS, BRENNAN KURZYDLO, DUBOIS and SMITH prejudicial abuse of discretion and failure to proceed in the manner required by law in the actions taken against plaintiff by the Federal Bureau of Prisons, and

each of the defendants, employees', agents and all other persons acting in concert and participation with them, in prejudicially abusing their discretion and failing to proceed in the manner against plaintiff by the Federal Bureau of Prisons, plaintiff was, has been, and continues to be deprived of Constitutional, civil, statutory and regulatory rights and immunities to such extent that her physical and mental health have been, and presently are being irreparably damaged beyond the ability of a pecuniary damages award alone to restore her to such sound physical and mental health. Plaintiff alleges that she has been injured by the acts of defendants and each of them to such a degree that it is impossible for her to accurately place a dollar amount to such loss, no amount of money, no matter how high the amount, being sufficient in itself to compensate her for such loss; therefore, plaintiff herein alleges compensatory damages in the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) and punitive damages in the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) to be assessed against defendants BRENNAN, KURZYDLO, DUBOIS and SMITH and each of them to the plaintiff.

103. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been, and, regardless of how many or which institutions she is or may be transferred to by Defendant QUINLAN or defendant QUINLAN'S employees or agents, will continue to be irreparably, injured by the conduct of the defendants and each of them, their successors in office, employees, agents and all other persons acting in concert and participation with them unless this

Court grants the Declaratory, Injunctive, and damages relief which plaintiff seeks.

VIII

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully prays that this Court enter judgment granting plaintiff.

1. A declaratory judgment that the actions and omissions of the defendants as described herein violates plaintiffs' rights as guarnteed [sic] by the United States Constitution;

2. A permanent injunction which:

a. Provides for the plaintiff to be confined in a co-correctional facility and prohibits her from being confined in any of the Federal Bureau of Prisons "penitentiares" [sic], USP-Terre Haute, USP-Leavenworth, USP-Lewisburg, USP-Lompoc or USP-Atlanta;

3. A jury trial on all issues' triable [sic] by jury.

4. Compensatory damages in the amount of One Hundred Thousand dollars ($100,000.00) to plaintiff from defendants BRENNAN, KURZYDLO, DUBOIS and SMITH.

5. Punitive damages in the amount of One Hundred Thousand dollars ($100,000.00) to plaintiff from defendants BRENNAN, KURZYDLO, DUBOIS and SMITH.

6. Plaintiffs' cost of this suit.

7. For such other and further relief as this Court may deem just and proper.

DATED: December 4, 1991

Respectfully submitted

/s/ Dee Farmer
Dee Farmer
In Propria Persona

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 91-C-716-S

(Caption Omitted In Printing)

ANSWER OF DEFENDANTS

Defendants, by their attorneys, Kevin C. Potter, United States Attorney for the Western District of Wisconsin, by J. B. Van Hollen, Assistant United States Attorney for that District, hereby submit this answer to plaintiff's complaint in the above-entitled matter.

Defendants answer as follows:

1. As to the first sentence, admit. As to the second sentence, deny knowledge or information sufficient to form a belief. As to the third sentence, deny.

2. To the extent that any allegation in paragraph 2 is not a statement of law to which no response is required, defendants deny all allegations.

3. The allegation in paragraph 3 is a statement of law to which no response is required.

4. Defendants admit that defendants Brennan and Kurzydlo reside in the Western District of Wisconsin. To the extent that any other allegations in paragraph 4 are not statements of law to which no response is required, defendants deny all other allegations.

5. Deny. Admit that plaintiff is in the custody of the United States Bureau of Prisons for a period of twenty years and is presently incarcerated at the United States

Medical Center for Federal Prisoners, Springfield, Missouri, a facility of the Bureau of Prisons.

6. As to the first sentence, admit. As to the second sentence, deny. As to the third sentence, deny. Admit that defendant Quinlan performed his duties as required. As to the fourth sentence, deny.

7. Admit.

8. As to the first sentence, admit. As to the second sentence, deny; admit that defendant Edwards performed his duties as required. As to the third sentence, deny.

9. Admit.

10. As to the first sentence, admit. As to the second sentence, deny. Admit defendant Brennan was responsible for the custody and care of inmates confined at FCI-Oxford.

11. Admit.

12. As to the first sentence, admit. As to the second sentence, deny. Admit defendant Kurzydlo is presently a unit manager at FCI-Oxford, Wisconsin. As to the third sentence, deny.

13. Deny defendant Kurzydlo is case manager. Admit remainder of the paragraph.

14. As to the first sentence, admit. As to the second sentence, deny. Admit that defendant DuBois was responsible for exercising some supervisory responsibilities within the North Central Region of the Bureau of Prisons. As to the third sentence, deny.

15. Admit.

16. As to the first sentence, admit. As to the second sentence, admit. As to the third sentence, deny.

17. Admit.

18. Deny knowledge or information sufficient to form a belief. Admit plaintiff is a biological male.

19. Deny knowledge or information sufficient to form a belief.

20. Deny knowledge or information sufficient to form a belief.

21. Deny knowledge or information sufficient to form a belief.

22. As to the first sentence, deny knowledge or information sufficient to form a belief. As to the second sentence, deny.

23. As to the first sentence, deny knowledge or information sufficient to form a belief. As to the second sentence, admit.

24. Deny knowledge or information sufficient to form a belief.

25. As to the first sentence, deny knowledge or information sufficent [sic] to form a belief. As to the second sentence, deny knowledge or information sufficent [sic] to form a belief. Admit the Bureau of Prison's medical and psychiatric personnel diagnosed plaintiff as a transsexual.

26. As to the first sentence, deny. Admit that records complied [sic] and maintained by the Bureau of Prisons describe plaintiff as a non-violent, passive/

aggressive individual who projects feminine characteristics. As to the second sentence, admit. As to the third sentence, admit.

27. Deny.

28. Deny knowledge or information sufficient to form a belief. Admit that transsexuals present a unique management problem in a correctional setting.

29. As to the first sentence, deny knowledge or information sufficient to form a belief. As to the second and third sentences, deny.

30. Admit, but submit that this provision has been rescinded and is no longer effective.

31. As to the first sentence, admit. As to the second sentence, deny. Admit that the Bureau of Prisons institutions were assigned security levels one through six and custody levels of in, out, max, and community. As to the third sentence, admit. As to the fourth sentence, deny. Admit that with regard to custody levels community is the lowest, followed by out, in and max is the highest. As to the fifth sentence, admit.

32. Admit.

33. Admit.

34. Deny.

35. Deny.

36. As to the first sentence, admit. As to the second sentence, deny knowledge or information sufficient to form a belief.

37. Deny knowledge or information sufficient to form a belief.

38. Deny. Admit that Bureau officials believed greater protection was warranted to ensure the plaintiff's safety.

39. Admit.

40. Deny. Admit that on August 19, 1986, a history and physical was prepared by Bureau's medical doctor at MCFP-Springfield. Said history states that examining physician was told by plaintiff that he had begun at age sixteen to identify more as a female, had some type of sex change operation in 1980 and has been on premarin (female hormone) for the past year.

41. Deny knowledge or information sufficient to form a belief.

42. Deny.

43. As to the first sentence, admit. As to the second sentence, admit. As to the third sentence, deny.

44. Deny knowledge or information sufficient to form a belief.

45. As to the first sentence, admit. As to the second and third sentences, deny knowledge or information sufficient to form a belief.

46. Deny. Admit that during plaintiff's entire stay at USP – Lewisburg he remained administratively detained. As to the second sentence, deny knowledge or information sufficient to form a belief.

47. As to the first sentence, admit. As to the second sentence, deny as vague and ambiguous.

48. Deny knowledge or information sufficient to form a belief.

49. Deny knowledge or information sufficient to form a belief.

50. Deny as vague and ambiguous.

51. Admit.

52. Deny knowledge or information sufficient to form a belief. Admit that some Bureau officials were aware that the plaintiff had successfully operated a credit card fraud organization while in custody.

53. Admit.

54. Deny. Admit that plaintiff was redesignated and transferred to the Federal Correctional Institution, Petersburg, Virginia.

55. Deny.

56. Deny. Admit that on March 17, 1987, the plaintiff arrived at FCI-Petersburg where he was placed in administrative detention pending initial classification by his assigned unit team.

57. Deny as being vague and ambiguous. Admit that FCI-Petersburg was a level four security level institution.

58. Deny. Admit that plaintiff was permitted in the general population at FCI-Petersburg and spent the majority of his stay at said institution in detention for committing disciplinary infractions.

59. Deny knowledge or information sufficient to form a belief.

60. Deny knowledge or information sufficient to form a belief. Admit the plaintiff sought psychological assistance while in confinement and did not report any sexual assaults to prison authorities.

61. Deny. Admit that while at FCI-Petersburg plaintiff received eleven incident reports involving indirectly or directly credit card fraud by a telephone. These disciplinary infractions included fraudulently ordering hair relaxer, ladies' sweat clothing, a lady's watch, ladies' eye glasses, as well as attempting to obtain a credit card number via telephone.

62. Admit.

63. As to the first sentence, deny. Admit that none of the disciplinary infractions involved violent behavior. As to the second sentence, deny knowledge or information sufficient to form a belief.

64. Admit.

65. Deny.

66. Deny knowledge or information sufficient to form a belief. Admit in January 1988 plaintiff was removed from FCI-Petersburg and placed in hold-over status at USP-Lewisburg.

67. Deny knowledge or information sufficient to form a belief. Admit that plaintiff was removed from USP-Lewisburg and transported to FCI-El Reno where he was administratively detained.

68. Deny knowledge or information sufficient to form a belief. Admit that plaintiff was removed from FCI-El Reno and transported to USP-Terre Haute where he was administratively detained.

69. Admit.

70. Deny as vague and ambiguous. Admit that FCI-Oxford was a security level four institution.

71. Deny knowledge or information sufficient to form a belief. Admit plaintiff was permitted to enter the general population at FCI-Oxford.

72. Admit.

73. Admit.

74. Deny. Admit that on February 18, 1988, defendant Brennan acknowledged having received plaintiff's complaint and denied the requested relief.

75. Admit.

76. Deny. Admit that on July 8, 1988, defendant Brennan acknowledged receipt of plaintiff's complaint and denied the requested relief.

77. Deny. ~~Adm~~it that on July 11, 1988, plaintiff appealed defendant Brennan's denial of his request for administrative remedy to defendant DuBois who denied the requested relief on August 12, 1988.

78. Admit.

79. Admit.

80. Admit.

81. Admit.

82. Deny. Admit that it was recommended that plaintiff receive a disciplinary transfer, pursuant thereto on February 6, 1989, defendant Kurzydlo prepared a request for transfer for defendant Brennan addressed to defendants DuBois and Smith recommending that plaintiff be transferred to USP-Leavenworth, Kansas. As to the second sentence, admit.

83. Deny.

84. Deny. Admit that defendants DuBois and Smith caused or allowed the plaintiff to be redesignated to the United States Penitentiary in Terre Haute, Indiana.

85. Deny as being vague and ambiguous. Admit that plaintiff received disciplinary reports for allegedly engaging in a sex act, writing another inmate, and unauthorized possession of motrin while at FCI-Oxford.

86. Deny. Admit that with regard to plaintiff's disciplinary reports in a letter dated February 14, 1988, Neil M. Blumberg, M.D.P.A., Diplomat, American Board of Psychiatry, Neurology and Forensic Psychiatry, wrote to case manager Mark Ciske, at FCI-Oxford, noting plaintiff's diagnosis of transsexualism and stating unless plaintiff received appropriate treatment for the above-noted problems, it was unlikely that his involvement in criminal activities would cease.

87. Deny. Admit that on March 9, 1989, defendant Brennan signed the order for the plaintiff to be transferred to USP-Terre Haute.

88. Deny. Admit plaintiff was received at the United States Penitentiary in Terre Haute, Indiana, on March 9,

1989, and placed in administrative detention because of a prior determination that plaintiff was HIV positive and posed a risk to himself or others. As to the second sentence, admit.

89. Deny knowledge or information sufficient to form a belief.

90. Deny knowledge or information sufficient to form a belief.

91. As to the first sentence, deny knowledge or information sufficient to form a belief. As to the second sentence, deny.

92. As to the first sentence, admit. As to the second sentence, deny. As to the third sentence, deny. As to the fourth sentence, deny knowledge or information sufficient to form a belief. Admit that USP-Terre Haute houses some violent offenders.

93. Deny.

94. Deny. Admit that defendants permitted the plaintiff to be designated and housed at USP-Terre Haute.

95. Deny.

96. Deny.

97. Deny. Admit that defendant Edwards was a warden at USP-Terre Haute during plaintiff's incarceration there.

98. Deny knowledge or information sufficient to form a belief.

99. Deny.

100. Deny.

101. Deny.

102. Deny.

103. Deny.

Any allegations not otherwise admitted or denied or hereby denied.

AFFIRMATIVE DEFENSES

1. The complaint fails to state a claim upon which relief can be granted.

2. The court lacks jurisdiction over the persons of the defendants.

3. Improper service of process by plaintiff.

4. Defendants are not liable under the Doctrine of Qualified Immunity.

5. Defendants' conduct did not result in a constitutional deprivation for plaintiff.

6. Defendants' conduct was not causally related to plaintiff's damages, if any.

Wherefore, having fully answered, asserting their defenses, defendants respectfully request the plaintiff's action be dismissed with prejudice and with costs and that the court grant such other relief as may be appropriate and just.

Dated this 24th day of January, 1992.

Respectfully submitted,

KEVIN C. POTTER
United States Attorney

By: /s/ J. B. Van Hollen
J. B. VAN HOLLEN
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
Case No. 91-C-716-S
(Caption Omitted In Printing)

DEFENDANTS, MOTION FOR SUMMARY JUDGMENT

Defendants, by their attorneys, Kevin C. Potter, United States Attorney for the Western District of Wisconsin, by Mark A. Cameli, Assistant United States Attorney for that district, hereby move the court to grant summary judgment in their favor pursuant to Rule 56, Federal Rules of Civil Procedure, as there is no genuine issue of material fact and because defendants are entitled to judgment as a matter of law. In support of this motion, defendants have attached proposed findings of fact and conclusion of law, with supporting declarations and a memorandum of law. These documents are incorporated into this motion by reference.

The plaintiff has been notified of the contents and meaning of Rule 56(e), Federal Rules of Civil Procedure, through a letter from counsel for the defendants. A copy of this letter is attached to this motion and incorporated by reference.

Wherefore, the defendants pray that the Court grant summary judgment in their favor, dismissing this action with prejudice and with costs, and for all other necessary and proper relief.

Dated this 18th day of February, 1992.

Respectfully submitted,

KEVIN C. POTTER
United States Attorney

By: /s/ Mark A. Cameli
MARK A. CAMELI
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
Case No. 91-C-716-S
(Caption Omitted In Printing)

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants, by their attorneys, Kevin C. Potter, United States Attorney for the Western District of Wisconsin, by Mark A. Cameli, Assistant United States Attorney for that district, hereby submit the following proposed findings of fact and conclusions of law in support of their motion for summary judgment.

I. FINDINGS OF FACT

There is no genuine issue as to material facts set forth below:

1. This is a civil action in which the plaintiff had been granted leave to proceed in *forma pauperis* on his claim that defendants were deliberately indifferent to his safety in violation of his Eighth Amendment rights. (Docket No. 1.)

2. Edward J. Brennan is employed as the Warden of the Federal Correction Institution (FCI) Oxford, Wisconsin, and has been employed in that capacity since July 19, 1987. (Brennan Declaration at Par. 1.)

3. Warden Brennan has had no direct personal involvement in any of the matters alleged in plaintiff's complaint, except for signing the transfer order dated

March 7, 1989. This order authorized the transfer of plaintiff from FCI-Oxford to the United States Penitentiary Terre Haute, Indiana, for disciplinary purposes. (Brennan Declaration at Par. 5.)

4. Warden Brennan has no personal knowledge concerning the alleged assault occurring at Terre Haute on or about April 1, 1989, nor did he have any knowledge of any assaultive behavior, or threats, which may have been directed at plaintiff while he was incarcerated at USP-Terre Haute, Indiana. (Brennan Declaration at Par. 6.)

5. Dennis M. Kurzydlo is presently employed as a unit manager at FCI-Oxford and has been employed in that capacity since August 27, 1989. (Kurzydlo Declaration at Par. 1.)

6. Plaintiff was confined at FCI-Oxford from January 27, 1988, until March 9, 1989. He is presently confined at the United States Medical Center, Springfield, Missouri. (Kurzydlo Declaration at Par. 3.)

7. On January 25, 1989, plaintiff was found guilty by a disciplinary hearing officer of Attempting to Give Anything of Value to Another. That incident represented plaintiff's fourth incident report since his arrival at FCI-Oxford during late January, 1988. (Kurzydlo Declaration at Par. 5.)

8. Imposed sanctions against plaintiff included, *inter alia*, a recommendation for a disciplinary transfer. (Kurzydlo Declaration at Par. 5.)

9. On January 31, 1989, as part of the transfer recommendation process, Mr. Kurzydlo prepared a progress

report on plaintiff. (Kurzydlo Declaration at Par. 6 and Attachment 2.)

10. On February 6, 1989, Mr. Kurzydlo prepared a request for transfer memorandum based on plaintiff's involvement in several rule infractions. Officer Kurzydlo concluded that plaintiff required the security and supervision offered at a penitentiary. (Kurzydlo Declaration at Par. 7 and Exhibit 3.)

11. From September 17, 1987, to April 4, 1990, plaintiff was classified as a security classification level 5 inmate under the Bureau of Prisons policy. At FCI-Oxford, he was being housed in a security level 4 institution. (Kurzydlo Declaration at Par. 8 and Attachment 4.)

12. At the time of plaintiff's transfer, USP-Terre Haute was a security level 4 institution by policy. Plaintiff could have been transferred to any security level 5 institution including, Lewisburg, Leavenworth, and Lompoc. Instead, he was transferred to Terre Haute for the purpose of placing him in a different environment consistent with his individual security needs. (Kurzydlo Declaration at Par. 9 and Attachment 5.) (Smith Declaration at Par. 4.)

13. Officer Kurzydlo believes that the correctional staff at USP-Terre Haute are well equipped to handle the problems and the needs presented by plaintiff and he relied upon this belief in his evaluation and recommendation to transfer plaintiff to USP-Terre Haute. (Kurzydlo Declaration at Par. 10.)

14. Officer Kurzydlo has no personal knowledge concerning the alleged assault which occurred against plaintiff on April 1, 1989, nor did he have any knowledge

of any assaultive behavior and threats against plaintiff at Terre Haute, Indiana. (Kurzydlo Declaration at Par. 11.)

15. Larry E. DuBois was the Regional Director, North Central Region, of the Federal Bureau of Prisons, at the time of plaintiff's transfer in March of 1989. (DuBois Declaration at Par. 1.)

16. In his capacity as Regional Director, Mr. DuBois exercised supervisory responsibility over subordinate staff to conduct investigations and process transfers for inmates. (DuBois Declaration at Par. 1.)

17. Mr. DuBois has no direct personal knowledge concerning plaintiff's transfer and recalls no personal involvement in the decision to transfer plaintiff from FCI-Oxford to USP-Terre Haute in March of 1989. (DuBois Declaration at Par. 3.)

18. Mr. DuBois is not a resident, property owner, nor business operator in Wisconsin, and he has no other connection with or within the State of Wisconsin. (DuBois Declaration at Par. 4.)

19. Mr. N. W. Smith was employed as the Correctional Services Administrator, North Central Region, Federal Bureau of Prisons, in March of 1989 at the time of plaintiff's transfer. (Smith Declaration at Par. 1.)

20. Mr. Smith has no direct personal knowledge concerning plaintiff's transfer. He relied upon information provided by the institution which indicated that plaintiff posed a significant risk to other inmates by his behavior. He was transferred as a result of disciplinary problems. (Smith Declaration at Par. 3.)

21. Among his many disciplinary problems, plaintiff had been found guilty by a disciplinary hearing officer of engaging in anal sex with an inmate on the recreation yard of the Special Housing Unit, FCI-Oxford, on January 23, 1989. Plaintiff knew of his status as HIV Positive since at least March 11, 1988, and had been counseled on several occasions regarding the grave danger such activity presented to other inmates. (Smith Declaration at Par. 3.) (*See also Farmer v. James R. Cowan*, Case No. 89-C-819-S.)

22. Plaintiff was transferred to Terre Haute for the purpose of placing him in a different environment consistent with his individual security needs. The correctional staff at USP-Terre Haute were well equipped in Mr. Smith's opinion to handle the problems and needs presented by plaintiff and he relied upon that belief in his evaluation and decision to transfer plaintiff. (Smith Declaration at Par. 4.)

23. Mr. Smith is not a resident, property owner, nor business operator in Wisconsin, nor does he have any connection with, or within, the State of Wisconsin. (Smith Declaration at Par. 5.)

24. J. Michael Quinlan is presently employed by the Federal Bureau of Prisons as its Director, and has been employed in that capacity since July of 1987. (Quinlan Declaration at Par. 1.)

25. Mr. Quinlan is neither a resident, nor property owner in the State of Wisconsin. (Quinlan Declaration at Par. 2.)

26. Decisions regarding the specific housing assignment of an inmate within the Federal Bureau of Prisons is delegated to the staff of each respective federal facility. Mr. Quinlan's personal approval as Director of the Federal Prison System is neither sought, nor required, in the overwhelming majority of inter-institutional inmate transfers which occur on a daily basis. (Quinlan Declaration at Par. 4.)

27. Mr. Quinlan was not involved in, nor did he have personal knowledge of, the transfer of plaintiff to the general population at the United States Penitentiary at Terre Haute, Indiana, on March 23, 1989. (Quinlan Declaration at Par. 5.)

28. Calvin R. Edwards was employed as Warden of USP-Terre Haute, Indiana, from December, 1987, until May, 1989. (Edwards Declaration at Par. 1.)

29. Mr. Edwards is neither a resident, property owner, nor business operator in the State of Wisconsin, nor does he have any connection with, or within, Wisconsin. (Edwards Declaration at Par. 3.)

30. At the time of plaintiff's transfer from FCI-Oxford to USP-Terre Haute on March 9, 1989, Mr. Edwards was employed as Warden at USP-Terre Haute. In this capacity he had no involvement whatsoever in the events alleged to have occurred at FCI-Oxford which prompted a request to transfer plaintiff to a greater level of supervision. Likewise, he was not involved in the decision to transfer plaintiff to USP-Terre Haute. (Edwards Declaration at Par. 4.)

31. Mr. Edwards did not serve on plaintiff's unit team or make initial classification decisions concerning inmate Farmer or any other inmate. Such decisions are delegated to subordinate staff to make trained, professional evaluations on housing and security assignments. (Edwards Declaration at Par. 5.)

32. Plaintiff never personally, or through correspondence, advised Mr. Edwards that he had any concerns for his safety in his housing assignment. Mr. Edwards was available to be approached by any inmate with such concerns. Likewise, plaintiff could have filed an administrative remedy request if he felt his housing assignment put him at risk. (Edwards Declaration at Par. 6.)

33. Mr. Edwards had no reason to believe that plaintiff could not function safely within the general population at USP-Terre Haute and he believes that the unit team acted appropriately in its determination of placement. (Edwards Declaration at Par. 7.)

34. On April 7, 1989, plaintiff was placed in administrative detention pursuant to a directive from the North Central Regional Office that plaintiff had been determined to be a high risk HIV positive case who required lock-down status pending hearing.

II. CONCLUSIONS OF LAW

1. The defendants are entitled to judgment as a matter of law.

2. The Court is without personal jurisdiction over defendants DuBois, Smith, Quinlan, and Edwards, as these defendants have insufficient contacts with the Western District of Wisconsin.

3. No defendant was personally responsible for, or involved in, the acts which form the basis of plaintiff's complaint.

4. No defendant was deliberately indifferent to a risk to plaintiff's safety while he was confined at USP-Terre Haute, Indiana.

5. All of the defendants' conduct was objectively reasonable based on the status of the law governing Eighth Amendment violations and accordingly, they are all entitled to qualified immunity.

6. The defendants are not liable to plaintiff.

7. Judgment is entered in favor of defendants, dismissing the plaintiff's complaint with prejudice and with costs.

Dated this 18th day of February, 1992.

Very truly yours,

KEVIN C. POTTER
United States Attorney

By: /s/ Mark A. Cameli
MARK A. CAMELI
United States Attorney

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Civil Action No. 91-C-716-S

(Caption Omitted In Printing)

DECLARATION OF CALVIN R. EDWARDS

I, Calvin R. Edwards, hereby deciare and state as follows:

1. From December, 1987 until May, 1989, I was employed as Warden, USP-Terre Haute, Indiana. From May, 1989 until October, 1990, I was employed as the Regional Director, Western Region, Federal Bureau of Prisons. From October, 1990 until present I have been employed as the Regional Director, North Central Region, Federal Bureau of Prisons.

2. I have not been personally served with a summons and complaint in this case. I have ~~been~~ informed that on December 30, 1991, staff at the North Central Regional Office received a summons and complaint by way of U.S. Mail, certified, return receipt requested. I have reviewed the complaint as forwarded to me but have not acknowledged receipt of the complaint or summons, nor have I received service of the complaint and summons in any other manner.

3. I am not a resident, nor do I own property, operate a business, or have any other connection with or within the State of Wisconsin.

4. At the time of Plaintiff's transfer from FCI-Oxford to USP-Terre Haute on March, 9 1989, I was employed as the Warden at USP-Terre Haute. In such capacity I had no involvement whatsoever in the events alleged to have occurred at FCI-Oxford which prompted the request to

the North Central Regional Office to transfer the inmate to a greater level of supervision, nor was I involved in the decision by the Regional Office to transfer this inmate to USP-Terre Haute.

5. All inmates, including those claiming to be transsexual inmates, are individually evaluated by the inmate's institution unit team for placement in the most appropriate correctional setting to handle the specific situation presented. See 28 CFR 524.10 et seq. As Warden, I did not serve on the Unit Team or make initial classification decisions concerning inmate Farmer or any other inmate. I relied upon my subordinate staff to professionally evaluate inmate Farmer's particular needs and situation and determine the most appropriate specific placement upon his designation to USP-Terre Haute. His assigned unit team was trained to make those professional evaluations and to make housing and security assignments.

6. At no time did inmate Farmer, either personally or through correspondence, advise me that he had any concerns whatsoever for his safety in his housing assignment. It was my practice to stand mainline in the dining hall and I was available to be approached personally by an inmate with such concerns. Further, this inmate could have filed an administrative remedy request if he felt his housing assignment put him at risk.

7. I had no reason to believe that inmate Farmer could not function safely within the general population at USP-Terre Haute, and I believe the unit team acted appropriately in its determination of placement.

8. On April 7, 1989, inmate Farmer was placed in administrative detention pursuant to directive from the

North Central Regional Office that inmate Farmer had been determined to be a high risk HIV-positive case who required lock-down status pending hearing. The request for controlled housing placement was made by staff at FCI-Oxford.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

Executed on February 18, 1992.

/s/ Calvin R. Edwards
Calvin R. Edwards
Regional Director
North Central Region
Federal Bureau of Prisons

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No.: 91-C-716-S

(Caption Omitted In Printing)

DECLARATION OF J. MICHAEL QUINLAN

I, J. MICHAEL QUINLAN, do hereby declare and state as follows:

(1) I am currently employed by the Federal Bureau of Prisons of the United States Department of Justice, as its Director. I have held this position since July, 1987. My business office is located in Washington, D.C.

(2) I do not reside in the state of Wisconsin. I do not own any personal or real property located in the state of Wisconsin.

(3) As to service of process in the above-styled civil action, Plaintiff's First Amended Complaint for Damages and Injunctive Relief was received at my office in Washington, D.C., by certified mail, on January 21, 1992.

(4) Decisions regarding the specific housing assignment of an inmate within the federal prison system are delegated to the staff of each respective federal facility. My personal approval as Director of the federal prison system is neither sought nor required in the overwhelming majority of inter-institutional inmate transfers which occur on a daily basis.

(5) Specifically, I was not involved in, nor did I have personal knowledge of, the transfer of Plaintiff in this case, federal inmate Douglas Farmer, reg. no. 23288-037,

to the general population at the United States Penitentiary in Terre Haute, Indiana, on March 23, 1989.

Pursuant to Title 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 18 day of FEBRUARY, 1992.

/s/ J. Michael Quinlan
J. MICHAEL QUINLAN
Director
Federal Bureau of Prisons

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action No.
91-C-716-S

(Caption Omitted In Printing)

AFFIDAVIT

COMES NOW, Steve R. Thomas, pursuant to the provisions of Title 28, United States Code, Section 1746, and declares under penalty of perjury under the laws of the United States of America that the statements made herein are true and correct.

1. I am currently employed at the United States Medical Center for Federal Prisoners (hereinafter USMCFP) as the Paralegal Specialist. This affidavit is submitted in response to the court order dated February 20, 1992, wherein Mr. Farmer alleges that he has not been allowed to review documents which were listed by the defendants in a discovery response.

2. On February 11, 1992, the following documents were reviewed by Mr. Farmer at the USMCFP:

July 31, 1990 – Memo from Warden Turner to L. E. DuBois, Regional Director, NCRO

July 17, 1990 – Memo from C. Kenneth Bowles to R. F. Harris

July 17, 1990 – Psychiatric Consultation-USMCFP, Springfield, Missouri

July 10, 1990 – Medical Transfer Summary, USMCFP, Springfield, Missouri

June 27, 1990 – Medical Service History and Physical USMCFP, Springfield, Missouri

April 2, 1990 – 90 – Day Review of Controlled Housing Status

June 23, 1989 – Memo from Dr. C. Williams to W. D. Gerth, DHO

May 8, 1989 – Memo from D. M. Hicks, HSA to Larry Morrison

May 1, 1989 – Memo from Dr. C. Williams to Lieutenant Hanley

Feb. 8, 1989 – Memo from Dennis Schimmel, Ph.D., to E. J. Brennan, Warden

July 14, 1988 – Letter form Neil Blumberg, M.D., to Mark

Sept. 5, 1986 – Transfer Summary, USMCFP, Springfield, Missouri

Aug. 22, 1986 – Psychological Report USMCFP, Springfield, Missouri

Aug. 6, 1986 – University of Maryland Hospital Consultation Report

3. In addition to the above-mentioned information, Mr. Farmer was shown where the above-referenced documents were located in his central and medical file.

Executed this 26th day of February, 1992.

[s] Steve R. Thomas
Steve R. Thomas
Paralegal Specialist
U. S. Medical Center for
Federal Prisoners
Springfield, Missouri

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action
No. 91-C-716-S

(Caption Omitted In Printing)

DECLARATION OF DARION J. WILLIS

I, Darion J. Willis, hereby declare and state as follows:

1. I am an inmate currently committed to the custody of the Attorney General. During 1989-90, I was incarcerated at the United States Penitentiary in Terre Haute, Indiana.

2. I met Dee Farmer while in administrative detention during March 1989 at USP-Terre Haute. Shortly after my release back into the general population, Ms. Farmer was also released into the general population. I was assigned unit 3K and she 3M; however, we communicated in the general population daily.

3. I am aware that Ms. Farmer is a transsexual and through my personal knowledge and observation of her at USP-Terre Haute, she presents herself mentally and physically as feminine.

4. On April 1, 1989, during the early morning, I learned from other inmates (I do not recall their names) that Ms. Farmer was sexually assaulted the previous night. In concern of her well-being, I went over to 3M to see Ms. Farmer, at which time I noticed she had a swollen face and busted lips, well as cuts in the mouth.

5. Upon talking to Ms. Farmer several minutes later, I learned that an inmate had come into her cell the

previous night and sexually assaulted her. She did not know the name of the inmate, and I was unable to ascertain the name of the inmate.

6. I gave Ms. Farmer some hydrogen peroxide for the cuts in her mouth, advised her to put ice packs on her face, and requested several friends to look out for her.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, pursuant to 28 U.S.C. § 1746.

_____ /s/ _____
Date Darion J. Willis

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
CIVIL ACTION NO. 91-C-716-S
(Caption Omitted In Printing)

RULE 56(f) MOTION IN RESPONSE
TO DEFENDANTS' UNTIMELY MOTION
FOR SUMMARY JUDGMENT

Comes now Dee Farmer, Plaintiff, without the benefit of counsel and moves this court, pursuant to Rule 56(f), Federal Rules of Civil Procedure and in support thereof submit:

1. Defendants' have filed a motion for summary judgment seeking judgment on the grounds of lack of personal jurisdiction, personal involvement and qualified immunity. Defendants' motion is untimely pursuant to this Courts' scheduling order entered in this case.

2. Though some of the issues' raised by the defendants' are legal in nature and previously considered by the Court, plaintiff cannot file a response to the substance of defendants' motion, because the materials necessary for the plaintiffs' response is in the possession of the defendants.

3. Though, plaintiff has submitted a second request for production of documents directed to defendant (illegible) a response to that request is not due until forty-five days after he was served with Plaintiffs' First Amended Complaint. Defendants' response to plaintiffs' second request for production of documents is due on or about March 14, 1992.

4. These documents are necessary to the plaintiffs' response of the defendants' motion for summary judgment. *See,* Declaration of Dee Farmer, attached hereto.

5. After plaintiff receive these documents she will need sufficient time to review and have the documents copied by prison officials for admission to the Court, with the appropriate opposition pleadings. Plaintiff does not anticipate that this can be completed until almost 10 days after she receive the response to her second request for documents.

Illegible PLAINTIFF PRAY'S THIS HONORABLE COURT TO:

(a) deny the defendants' motion for summary judgment, or

(b) grant plaintiff until March 24, 1992 after she receive defendants' response to her second request for production of documents, which to file the opposition to defendants' motion for summary judgment;

(c) Any further and different relief this Court deems just and proper.

Respectfully submitted,

/s/ Dee Farmer
Dee Farmer
Register Number 23200-037
United States Medical Center
Post Office Box 4000
Springfield, Missouri 65200

(Certificate Of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
CIVIL ACTION NO. 91-C-716-S
(Caption Omitted In Printing)

I, Dee Farmer, hereby declare and state:

1. I am the plaintiff in the above captioned-case, in which I claim that the named defendants' were deliberate indifferent to my safety by designating me to a violent institution knowing that because of my transsexual condition I would be in grave danger of sexual assault and indeed, after only being in the general population of said institution for one week I was raped.

2. I have received a copy of the defendants' motion for summary judgment, which they assert claims of lack of personal involvement, qualified immunity and lack of personal jurisdiction. Defendants' motion is untimely according to the Court scheduling order.

3. Currently, I am awaiting a response from the defendants' to my second request for production of documents, which is due on or about March 14, 1992. The documents responsive to my (Illegible) request are necessary for the preparation of my response to the defendants' motion for summary judgment particularly, with regard to the personal involvement of each defendant and especially defendant Quinlan. The defendants are expected to show that each defendant had knowledge that USP-Terre Haute was and is, a violent institution with a history of sexual assault, stabbings, etc. The evidence is further expected to show that each defendant showed reckless disregard for my safety by designating

me to said institution knowing that I would be sexually assaulted. Moreover, the documents will demonstrate though the defendants' were aware of the danger of placing preoperate transsexual in violent environment of a penal institution they failed to promulgate any policy or directive for the effective designation of transsexual inmates.

4. Until I receive these documents I can not properly and effectively file a response to the defendants' motion for summary judgment.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

3-3-92
Date

/s/ Dee Farmer
Dee Farmer

IN PRO PER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action No. 91-C-716-S

(Caption Omitted In Printing)

I, DEE FARMER, do hereby declare and state:

1. I am a federal inmate and have been confined in Bureau of Prisons institutions since August, 1986. I was convicted in the United States District Court of Maryland for violations of 18 U.S.C. § 1029 (Credit-card fraud) and sentence to a twenty (20) year term of imprisonment. I am currently confined at the United States Medical Center for Federal Prisoners' in Springfield, Missouri.

EXHIBIT 1 – (Judgment and Commitment).

2. Prior to my commitment to the Federal Bureau of Prisons, I was diagnosed as a transsexual. My transsexualism was communicated to the Bureau of Prisons through my Pre-Sentence Report and the Psychiatric Report of Dr. Niel Blumberg. EXHIBIT 2 & 3 (Presentence Report and Dr. Niel Blumberg Psychiatric Report).

3. I was transported by the U. S. Marshal's in Baltimore, MD to the United States Penitentiary, Lewisburg, Pennsylvania ("USP-Lewisburg") where I was housed overnight in a hospital segregation cell, because of my transsexuality. Also, Tonett Johnson and Simone Scott – both transsexuals – were housed in the hospital segregation unit. The following day I was transported by Bureau of Prisons airlift to the United States Medical Center for

Federal Prisoners' in Springfield, Missouri ("USMCFP-Springfield").

EXHIBIT 4 – (Inmate Movement).

4. On August 15, 1986 I arrived at USMCFP-Springfield and was placed in administrative segregation because of my transsexualism. Subsequently, I was permitted to interact with terminally ill patients on Ward 3-2, where I was housed. While at USMCFP-Springfield, I was seen by several doctors who prepared reports documenting my transsexuality. Specifically, a psychological report was prepared that stated I would be subject to a great deal of sexual pressure during my incarceration because of my youth and feminine appearance.

EXHIBIT 5 – (Medical and Psychological Report).

5. On or about September 1, 1986, a Transfer Request was sent to the Bureau of Prisons, North Central Regional Office, documenting my transsexualism and recommending I be transferred to USP-Lewisburg. On October 17, 1986, I was transferred from USMCFP-Springfield and placed enroute to USP-Lewisburg with temporary holdover at the Federal Correctional Institution in Elreno, Oklahoma ("FCI-Elreno"), where I was administratively segregated because of my transsexualism. EXHIBIT 6 & 7 (USMCFP-Springfield Transfer Order and Transfer Request).

6. On November 7, 1986 I arrived at USP-Lewisburg and was again administratively segregated. I was given a

detention order that confers: Inmate Farmer is a transsexual who is 21 years old, designated to USP-Lewisburg. Accordingly, she is being placed in detention. During my entire stay at USP-Lewisburg i remained segregated. The reasons for my segregation was further documented in an administrative remedy response prepared for Defendant EDWARDS (then, Warden at USP-Lewisburg), stating that there was a high probability that I could not safely function at USP-Lewisburg. It was explained to me by Captain Williams, that if they were to permit me to enter the general population at USP-Lewisburg I would be raped at knife point or possibly murdered because I would be the closest thing the inmates could get to a woman. In the case of *Farmer v. Carlson*, 685 F.Supp. 1335 (M.D. Pa. 1988), initiated by me, which Defendant EDWARDS was a defendant and served with a copy of the complaint, the court upheld the Bureau of Prisons decision to transfer me from USP-Lewisburg, because there was a high probability of danger to my life.

EXHIBITS 8, 9, 10 ("USP-Lewisburg, Detention Order, Administrative Remedy, Farmer v. Carlson).

7. Also, while I was at USP-Lewisburg, a medical summary was prepared which claimed that my last dosage of Premarin (illegal and without authorization) had been one month earlier and pertinent physical examination findings included some decrease in facial hair and rearrangement of body fat to a female distribution. A summary was also prepared regarding the continuation of my previous medication Premarin – a conjugated estrogen.

EXHIBIT 11 – (Medical Summary, *also see Farmer v. Carlson, supra* at ___).

8. On March 17, 1987 I was transferred from USP-Lewisburg to the Federal Correctional Institution in Petersburg, Virginia ("FCI-Petersburg). I was administratively segregated upon my arrival at FCI-Petersburg, for a very short time, because of my transsexualism. Later I was released into the general population where I was constantly approached by inmates for sex. I was even threatened and on three occasions I was forced by physical abuse and intimidation to engage in sexual intercourse with inmates.

9. I often sought psychological counseling and medical assistance for help with problems related to my transsexualism.

10. In January, 1988, I was transferred from FCI-Petersburg to the Federal Correctional Institution in Oxford, Wisconsin ("FCI-Oxford"), with holdover housing at USP-Lewisburg, FCI-Elreno and the United States Penitentiary, Terre Haute, Indiana ("USP-Terre Haute"). At each of these hold-over institutions I was administratively segregated solely because of my transsexualism.

11. I arrived at FCI-Oxford in January, 1988, and was released shortly thereafter into the general population. On February 4, 1988, my transsexualism was documented in a psychological questionnaire and summary. On February 8 and June 22, 1988, I filed administrative remedies with Defendant BRENNAN that outlined my transsexuality. For example, one remedy stated: Farmer, a transsexual prior to her incarceration received psychological counseling for a sex-change operation at Johns'

Hopkins University. Additionally, she received the medication of conjugated estrogen and had an unsuccessful operation on the blackmarket in New York City to have her testicles removed.

EXHIBITS 12, 13, and 14 – (Psychological Summary and Administrative Remedies).

12. On July 11, 1988, I filed an administrative remedy with Defendant DUBOIS that concerned by transsexualism.

EXHIBIT 15 – (Regional Administrative Remedy Appeal).

13. On February 12, 1988, I brought the case of *Farmer v. Edwin Meese, Michael Quinlan, E. J. Brennan, and Mr. Haas*, 88-C-110-S (W.D.Wi 1988) directly regarding my transsexualism. Both Defendant QUINLAN and BRENNAN received service of process in this case and relied on the case of *Farmer v. Carlson, supra*, in their response. Thus, they are aware of my transsexuality and danger to my safety because of my transsexualism.

EXHIBIT 16 – (*Farmer v. Meese*, et al., 88-C-110-S).

14. While in the general population at FCI-Oxford, I presented myself as a female and was often observed by Defendants' BRENNAN and KURZYDLO. Further, because of my feminine appearance I received a lot of sexual pressure from fellow inmates and on at least one occasion was forced to engage in a sex act with another inmate.

15. Also, while at FCI-Oxford, I brought the case of *Farmer v. Quinlan*, 88-0879J6P (District of Columbia) (claiming discrimination because of my transsexualism). Defendant QUINLAN received a copy of the complaint in this case, which gave him knowledge of my transsexualism.

16. I was transferred from FCI-Petersburg to FCI-Oxford for disciplinary reasons. Particularly, while at FCI-Petersburg, I received disciplinary reports for alleged infractions such as fraudulently ordering ladies sweat clothing, hair relaxer and watch; wearing my T-shirt in a female fashion (off one shoulder) which prison officials claimed exposed a portion of my breast, and attempting to introduce female hormones in the institution. I also received on disciplinary report at USMCFP-Springfield and USP-Lewisburg for alleged credit-card misuse. At FCI-Oxford I received similar incident reports for allegedly attempting to introduce female hormones into the institution and fraudulently ordering a ladies watch and flowers for other inmates. Throughout my incarceration I have had to smuggle female hormones into the institution.

EXHIBIT 17 – (Incident reports from FCI-Petersburg, USMCFP-Springfield, USP-Lewisburg and FCI-Oxford).

17. As a result of the incident report of allegedly fraudulently ordering flowers for other inmates, it was recommended that I be given a disciplinary transfer. Pursuant thereto on February 6, 1989, Defendant KURZYDLO prepared a Request for Transfer for Defendant BRENNAN, addressed to Defendant DUBOIS and

SMITH, recommending that I be transferred to a maximum security penitentiary. Defendant KURZYDLO included a copy o f [sic] my Pre-Sentence Investigation Report, which thoroughly documents my transsexualism. He also included a Progress Report that outlined my previous transfers.

EXHIBIT 18 and 19 – (Request for Transfer and Progress Report)

18. Though Defendant KURZYDLO recommended that I be transferred to the United States Penitentiary in Leavenworth, Kansas, Defendants DUBOIS and SMITH, directly or indirectly, redesignated me to USP-Terre Haute, and on March 9, 1989 Defendant BRENNAN signed a Transfer Order for me to be transferred to USP-Terre Haute.

EXHIBIT 20 – (Transfer Order)

19. Prior to my transfer from FCI-Oxford, I received three additional disciplinary reports for allegedly engaging in a sex act, writing another inmate and unauthorized possession of a Motrin, aspirin. With regard to my disciplinary reports in a letter dated July 14, 1988, from Niel Blumberg, M.D.P.A., Diplomat American Board of Psychiatry, Neurology and Forensic Psychiatry, addressed to prison officials at FCI-Oxford, advising them of my transsexualism and other mental disorders and concluding that unless I receive appropriate treatment for my problems, it is unlikely that my involvement in criminal activities would cease. Though, Defendants' here seem to imply that my non-violent, non-aggressive, fraud type

disciplinary infractions warrant my placement in a maximum security institution of the Bureau of Prisons. Officials at USP-Lewisburg were aware of these same facts, but still because of the danger to my safety, would not release me into the penitentiary environment. Furthermore, Defendant EDWARDS declares that he was advised of these facts before I ever reached USP-Lewisburg.

EXHIBITS 21 and 22 – (Letter from Niel Blumberg, M.D.P.A., Declaration of Calvin Edwards).

20. Defendant [sic] KURZYDLO, BRENNAN, DUBOIS and SMITH knew that the environment of a penitentiary would not necessarily offer me any additional security, benefits or otherwise serve a legitimate interest.

21. BUREAU OF PRISONS, HEALTH SERVICE MANUAL 6100.2 confers that transsexuals will ordinarily be placed in co-correctional facilities. However, neither Defendant QUINLAN, EDWARDS, BRENNAN, KURZYDLO, DUBOIS or SMITH adhered or observed this policy in designating me to institutions within the Federal Bureau of Prisons, including USP-Terre Haute. Moreover, Defendant QUINLAN has failed to make the policy effective or determine its' effectiveness, enforce its' provisions or reference it in any of the Federal Bureau of Prisons policies normally used to determine an inmates designation.

EXHIBIT 24 – (BUREAU OF PRISONS, HEALTH SERVICE MANUAL)

22. In fact, the Federal Bureau of Prisons, its' employees and agents believe and rely on Bureau of

Prisons, Security and Classification Manual when determining inmate's designations, including transsexuals.

EXHIBIT 25 – (ADMINISTRATIVE REMEDIES)

23. Bureau of Prisons, Security Classification and Designation Manuals essentially asserts certain criteria for determining an inmates security and custody level and assigns particular security and custody levels to federal institutions. However, the policy gives prison officials broad discretion in designating inmates and also provides a sliding scale. At all times mentioned in this declaration, USP-Lewisburg was a level 5, USP-Terre Haute, FCI-Petersburg and FCI-Oxford was a level 4. With regard to USP-Terre Haute though it was a level 4, because it is designed as a penitentiary it offered greater security than any other level 4 institution. At one point and now USP-Terre Haute is considered a level 5 institution.

EXHIBIT 26 – (BUREAU OF PRISONS, SECURITY AND DESIGNATION MANUALS)

24. On March 23, 1989 I was released into the general population at USP-Terre Haute, and assigned to Unite [sic] 3M. On April 1, 1989, approximately one week later between 9-10 p.m. an inmate I know only as D.C., entered my cell and asked me what I was going to do. Obviously, referring to having sex with him. I responded I wasn't going to do anything. I could tell that he had been drinking because his words were slurred and I could smell the alcohol on him. After I said I wasn't going to do anything, he just stared at me for a moment

(it seem like forever), than [then] he punched me in the face, knocking me back up against the locker and into the window. He continued to hit me and I kept trying to grab his hands and he said if you don't let my hands go I will use my feet. I kept holding his hand and saying "Why are you doing this?" So he raised his foot and started kicking me, that is when I saw the home made knife stuck in his sneaker, and let his hands go. He hit me a few more times before tearing and pulling my clothes off me, holding me down on the bed and forcibly raping me. Then he left. Before he left was the most terrifying moment, because for the time I saw the knife until he left I was frantic he was going to stab me.

After he left I just laid there for a few minutes, not knowing what to do, than I remembered hearing everybody yelling count time, so I got up and began to try and pull myself together before my cell mate returned. One thing I recall distinctly is there was blood on the mirror and it made me nervous. My face was swollen, my lips and nose were busted, there was a scratch on my back and there was some anal bleeding.

I heard my cell mate and another inmate coming so I washed my face, pushed the locker back, etc. When my cell mate and the other inmate (whom left immediately because it was count time) come in the cell and I could tell they already knew. After count several guys come and ask me what I was going to do – was I going to "snitch". I shouldn't "snitch" because wherever I went somebody would get me. Thank [sic] to make matters worst, D.C. came back, with his chest stuck-out and said, "These guys keep riding me, I guess I shouldn't have done that to you, you're a girl." At that point, I began to

openly cry and ask everybody to please leave me alone. Several days later I was moved to another unit. On April 7, 1989, I was placed in administrative detention, at which time I informed several prison officials of the rape. However, the only mention of the incident, is in a 90 day Review Report, dated February 1, 1990, stating I was assaulted. This Report also states: "It was the review committee's consensus that Farmer would project feminine characteristics in the general population. . . .

The medical department and psychological department agree that M[s] Farmer projects feminine characteristics, both mentally and physically. . . . it is the belief of the review team that M[s] Farmer will be perceived by other inmates as feminine and be pressured for sexual favors. . . . Lieutenant Kerr indicates that inmate Farmer may not actively pursue sexual relationships but may be pressured buy [sic] other inmates because of h[er] appearance.

EXHIBIT 27 – (90 DAY REVIEW – USP-Terre Haute)

25. While at USP-Terre Haute, I witnessed numerous assaults, fights and other acts of violence. There was enormous amounts of drugs and alcohol in the population. The environment of USP-Terre Haute is much more aggressive and violent, than either FCI-Petersburg or FCI-Oxford. I am aware of several inmates who were sexually assaulted at USP-Terre Haute, including Jeff Fies, who was forced to perform sex acts with other inmates and Courtney Moore, who received a cut from the tip of her neck straight down her spine. There were also work strikes, riots, etc. while I was at USP-Terre

Haute. Further, there were numerous inmates in protective custody because they believed the population of USP-Terre Haute posed a danger to their lives. Some of these inmates were LaRosa Richardson, Clinton Stiener, Roger Bartley, Ricardo Jackson, etc.

EXHIBIT 28 – (INMATE AFFIDAVITS)

26. Because of the inmates I witnessed receiving disciplinary transfers to and from USP-Terre Haute, I know without a doubt that Defendants BRENNEN, KURZYDLO, DUBOIS and SMITH knew USP-Terre Haute was a violent type institution. Inasmuch as inmates who commit violent acts at FCI-Oxford are often transferred to USP-Terre Haute and of course Defendant BRENNAN and KURZYDLO are involved in those transfers. While Defendant SMITH handled a slew of disciplinary transfers from USP-Terre Haute and Defendant DUBOIS reviewed administrative appeals, etc., presenting the environment of USP-Terre Haute. Furthermore, while I was at USP-Terre Haute, Defendant EDWARDS was the Warden for a short time.

27. During the entire period I was in USP-Terre Haute, I was sexually pressured by inmates even while in detention. A good example of the inmates at USP-Terre Haute is presented in an incident that occurred while I was returning from Court in Wisconsin during May, 1991. I was placed at USP-Terre Haute as a holdover and administrative segregated in their Special Housing Unit. In the cell next to me was an inmate from USP-Terre Haute general population who demanded that I masturbate him through the cell bars and when I refused he did

it himself, then demanded that I eat his semen. When I refused this too, he began to threaten me, telling me I didn't know who I was fucking with. I was messing up the game and if I went to recreation he was going to fuck me up. It was not uncommon to encounter these types of inmates during my incarceration at USP-Terre Haute.

I declare under penalty of perjury that the forgoing is true and correct.

3-13-92
Date

/s/ Dee Farmer
Dee Farmer

(Certificate of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Order 91-C-716-S

(Caption Omitted In Printing)

Plaintiff Dee Farmer was allowed to proceed *in forma pauperis* on his Eighth Amendment claim against defendants Edward Brennan, Dennis Kurzydlo, Larry E. DuBois, N.W. Smith, Michael Quinlan and Calvin Edwards. Plaintiff alleges in his complaint that the defendants were deliberately indifferent to his safety when they transferred him to the United States Penitentiary, Terre Haute, Indiana (USP-Terre Haute) on March 9, 1989.

An amended scheduling order was entered in the above entitled matter on December 20, 1991 requiring dispositive motions to be filed not later than February 15, 1992. Defendants timely moved for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56, on February 18, 1992 the first work day after February 15, 1992. The defendants submitted proposed findings of fact and conclusions of law, affidavits and a brief in support of the motion.

Plaintiff's response to defendants' motion for summary judgment was to be filed not later than March 9, 1992. On March 9, 1992 defendants received a document entitled, "Rule 56(f) motion in response to defendants' untimely motion for summary judgment". This document which was not received by the Court until March 18, 1992 requests that defendants' motion for summary judgment be denied until plaintiff receives defendant Quinlan's response to his second request for documents which was

to be filed not later than March 14, 1992. Since these documents, not shown by plaintiff to be necessary to oppose defendants' motion for summary judgment, were not to be filed until after both plaintiff's dispositive motion and brief in opposition to defendants' motion for summary judgment, plaintiff's Rule 56(f) motion will be denied.

On March 17, 1992 defendants filed a motion for protective order staying discovery until their motion for summary judgment on the issue of qualified immunity has been decided. Defendants' motion for a protective order will be granted.

Plaintiff also filed a brief in opposition to defendants' motion for summary judgment, an affidavit and a cross motion for summary judgment on March 18, 1992. Although plaintiff's brief in opposition to defendants' motion for summary judgment and his cross motion for summary judgment are untimely they will be considered.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a

genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff is an inmate currently confined at the United States Medical Center for Federal Prisoners, Springfield, Missouri (USMCFP). He was confined at the Federal Correctional Institution, Oxford, Wisconsin (FCI-Oxford) from January 27, 1988 until March 9, 1989.

At all times material to this action defendant Edward Brennan was the warden and defendant Dennis Kurzydlo was a unit manager at FCI-Oxford. Defendant Calvin Edwards was the warden at USP-Terre Haute from December 1987 until May 1989.

At all times material to this action defendant Larry E. DuBois was the Regional Director and defendant N.W. Smith was the Correctional Services Administrator of the North Central Region, Federal Bureau of Prisons. Defendant J. Michael Quinlan was the Director of the Federal Bureau of Prisons.

On January 25, 1989 plaintiff was found guilty by a disciplinary hearing officer at FCI-Oxford of Attempting to Give Anything of Value to Another. Disciplinary sanctions included a recommendation for a disciplinary transfer. On January 31, 1989 defendant Kurzydlo prepared plaintiff's progress report and on February 6, 1989 he requested that plaintiff be transferred to USP-Terre Haute. Defendant Kurzydlo believed that USP-Terre Haute was well equipped to handle the problems and needs presented by plaintiff.

At the time of plaintiff's transfer on March 9, 1989 defendant Calvin Edwards was the warden at USP-Terre Haute. Plaintiff never personally or through correspondence advised defendant Edwards that he was concerned for his safety. Defendant Edwards had no reason to believe that plaintiff could not function safely within the population at USP-Terre Haute. None of the defendants had actual knowledge that there was a threat to plaintiff's safety at USP-Terre Haute.

On April 1, 1989 plainitff [sic] alleges that he was sexually assaulted by another inmate. On April 7, 1989 plaintiff was placed in administrative detention pursuant to a directive from the North Central Regional Office pending a hearing concerning his HIV positive status.

CONCLUSIONS OF LAW

Plaintiff claims that his Eighth Amendment rights were violated by the defendants when they transferred him to USP-Terre Haute on March 9, 1989. Since there is no genuine dispute of any material fact this case can be decided as a matter of law. The failure of prison officials

to protect an inmate from assault by another inmate may violate an inmate's Eighth Amendment rights if the officials were deliberately indifferent to a strong likelihood of attack. *Meriweather v. Faulkner,* 821 F. 2d 408, 417 (7th Cir. 1987), *cert. denied* 108 S.Ct. 311 (1987).

Prison officials are liable under the Eighth Amendment if they had actual knowledge of a threat to an inmate's safety and failed to take action to prevent the danger. *McGill v. Duckworth,* 944 F. 2d 344, 349 (7th Cir. 1991). A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety. *Id.* The officials' failure to prevent an attack of an inmate must be deliberate or reckless in a criminal sense. *Santiago v. Lane,* 894 F. 2d 218, 221 (7th Cir. 1990).

Defendants did not know that plaintiff would be in imminent danger of attack if he were transferred to USP-Terre Haute. Plaintiff never expressed any concern for his safety to any of the defendants. Since defendants had no knowledge of any potential danger to plaintiff, they were not deliberately indifferent to his safety. Accordingly plaintiff's Eighth Amendment rights were not violated and defendants' motion for summary judgment will be granted. Plaintiff's cross motion for summary judgment will be denied.

Plaintiff has filed motions for telephonic depositions, photographic discovery and to compel discovery. These motions must be denied as moot. Plaintiff's motions for extension of time to name witnesses, file documents and exclude certain evidence are also denied as moot.

ORDER

IT IS ORDERED that defendants' motion for a protective order is GRANTED.

IT IS FURTHER ORDERED that plaintiff's Rule 56(f) motion and cross motion for summary judgment are DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for telephonic depositions, photographic discovery and to compel discovery are DENIED as moot.

IT IS FURTHER ORDERED that plaintiff's motions to name additional witnesses, file documents and exclude certain evidence are DENIED as moot.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

Farmer v. Brennan, et. al., 91-C-716-S

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants and against the plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 20th day of March, 1992.

BY THE COURT:

/s/ John C. Shabaz
John C. Shabaz
District Judge

(Certificate Of Service Omitted In Printing)

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

DOCKET NUMBER 91-C-716-S

(Caption Omitted In Printing)

[ ] **Jury Verdict**. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came on for consideration before the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is entered in favor of the defendants, Edward Brennan, Dennis Kurzydlo, Larry E. Dubois, N.W. Smith, Michael Quinlan and Calvin Edwards, against the plaintiff Dee Farmer DISMISSING plaintiff's complaint and all claims contained therein with prejudice and costs.

APPROVED AS TO FORM
this 20th day of March, 1992.

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

(Certificate Of Service Omitted In Printing)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

SUBMITTED: August 6, 1992
August 7, 1992

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

DEE FARMER, Plaintiff-Appellant, No. 92-1772 v. EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS, et al., Defendants-Appellees.	]]]]]]]]]	Appeal from the United States District Court for the Western District of Wisconsin. No. 91 C 716 John C. Shabaz, Judge.

This matter comes before the court for its consideration upon the request for the following documents:

1. **PETITION FOR LEAVE TO FILE AND TO PROCEED ON APPEAL IN FORMA PAUPERIS** filed herein on 5/28/92, by the appellant.

2. **"MOTION TO CONSOLIDATE CASES"** filed herein on 7/17/92, by the appellant.

This court has carefully reviewed the final order of the district court, the record on appeal and the appellant's motion. Based on this review, the court has determined that any issues which could be raised are insubstantial and the filing of briefs would not be helpful

to the court's consideration of the issues. *See Mather v. Village of Mundelein*, 869 F.2d 356, 357 (7th Cir. 1989) (*per curiam*) (court can decide case on motions papers and record where briefing would be a waste of time and no member of the panel desires briefing or argument). Accordingly,

IT IS ORDERED that the appellant's motion for leave to proceed on appeal in forma pauperis is **DENIED** and the district court is summarily **AFFIRMED.**

IT IS FURTHER ORDERED that the motion to consolidate cases is **DENIED AS MOOT.**

SUPREME COURT OF THE UNITED STATES

No. 92-7247

Dee Farmer,

Petitioner

v.

Edward Brennan, Warden, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 5, 1994. Rule 29 does not apply.

October 4, 1993

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(5)

No. 92-7247

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DEE FARMER,
Petitioner,
v.
EDWARD BRENNAN, WARDEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER

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(Appointed by this Court)
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60 pp

QUESTION PRESENTED

Does the "deliberate indifference" standard adopted in *City of Canton, Ohio v. Harris,* 489 U.S. 378 (1989), govern Eighth Amendment claims regarding failure to protect prisoners from assault?

LIST OF PARTIES

The petitioner Dee Farmer is a prisoner currently confined at the Federal Correctional Institution in Florence, Colorado. Respondent Michael J. Quinlan was sued in his official capacity as Director of the Bureau of Prisons. The current Director is Kathleen M. Hawk. Respondent Calvin Edwards was sued in his official capacity as Regional Director of the Bureau of Prisons.[1] Larry E. DuBois was also sued in his official capacity as Regional Director of the Bureau of Prisons. The current Regional Director is Patrick R. Kane. Respondent Edward Brennan was sued individually and in his official capacity as warden of the Federal Correctional Institution in Oxford, Wisconsin. The current warden at Oxford is John McHurley. Dennis Kurzydlo was sued individually and in his official capacity as case manager at Oxford. N.W. Smith was sued individually and in his official capacity as the Correctional Services Administrator of the Bureau of Prisons.

[1] Respondent Edwards was the Warden at the United States Penitentiary in Terre Haute, Indiana at the time of the relevant events in this case. *See infra* n.12, n.18.

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BRIEF OF PETITIONER

OPINIONS BELOW

The unreported order of the United States Court of Appeals for the Seventh Circuit, entered on August 7, 1992, is reprinted in the Joint Appendix (hereinafter "J.A.") separately filed. J.A. at 127. The unreported trial court opinion is also reprinted in the Joint Appendix. J.A. at 120.

JURISDICTION

Petitioner filed this action on August 20, 1991. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331. The district court granted respondents' motion for summary judgment on March 20, 1992. Petitioner filed a notice of appeal on April 4, 1992. The United States Court of Appeals for the Seventh Circuit issued an order denying petitioner leave to appeal *in forma pauperis* and summarily affirming the district court on August 7, 1992. On November 1, 1992, the Honorable John Paul Stevens, Circuit Justice for the Seventh Circuit, granted an application to extend until January 4, 1993 the time for filing a petition for writ of certiorari. The petition was filed on January 1, 1993, and the Court granted the petition and the motion for leave to proceed *in forma pauperis* on October 4, 1993. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Eighth Amendment to the United States Constitution, which provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. Facts

Petitioner was admitted to the Federal Bureau of Prisons (hereinafter BOP) on August 5, 1986. At the time of her [2] commitment, petitioner was a pre-operative transsexual. She had undergone treatment for silicone breast implants and unsuccessful surgery to have her testicles removed.[3] Moreover, she was taking estrogen hormone pills to ensure a female appearance.[4]

Prior to the time of the incident at issue in this case, the BOP had housed petitioner in several different facilities. In the majority of those facilities, the BOP segregated petitioner from the general population.[5] On March 9, 1989, petitioner was transferred from the Federal Correctional Institution in Oxford, Wisconsin (hereinafter FCI-Oxford) to the United States Penitentiary in Terre Haute, Indiana (hereinafter USP-Terre Haute), a maximum security penitentiary, following a disciplinary charge for "attempting to give anything of value to another" based on petitioner's use of a credit card to order fruit baskets and flowers by the prison telephone.[6] The transfer order was prepared by respondent Kurzydlo, case manager at Oxford, and signed by respondent Warden Brennan for submission to respondents DuBois and Smith.[7] It recommended that petitioner be placed in a maximum security penitentiary with higher security provisions than at FCI-Oxford, notwithstanding that, as stated by respondents, "none of the disciplinary infractions involved violent behavior" by petitioner.[8]

Petitioner was initially housed in administrative segregation at USP-Terre Haute, but was subsequently released to general population housing on March 23, 1989. Petitioner alleges that on April 1, 1989, while in her assigned cell, she was approached by a prisoner who demanded that she have sexual intercourse with him. Petitioner further alleges that when she refused, the prisoner repeatedly punched her in the face, pushed her, and kicked her with his feet, revealing a homemade knife stuck in his sneaker. According to petitioner's declaration, her clothing was torn off as her attacker held her down on the bed and forcibly raped her.[9] Petitioner further alleges that her attacker threatened to murder her if she reported him.[10] She reported the incident one week later.

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[2] Petitioner was born a male but, due to her transsexual status, she will hereinafter be referred to with feminine pronouns in accordance with her preference.

[3] *Farmer v. Haas, Brennan and DuBois*, No. 90-1088, 1991 U.S. App. LEXIS 3549, at *1 n.1 (7th Cir. March 1, 1991) (prior case filed by petitioner); *see infra* n.20.

[4] Declaration of Dee Farmer (hereinafter Farmer Declaration), J.A. at 107 ¶ 7.

[5] Petitioner alleges that she was held in administrative detention at USP-Lewisburg, FCI-Petersburg, FCI-El Reno, FCI-Oxford, and, initially, at USP-Terre Haute. Farmer Declaration, J.A. at 107 ¶¶ 5, 6, 8, 10; *see also* Answer of Defendants, J.A. at 71 ¶¶ 46, 56, 58, 67, 68. Respondents admit that petitioner was held in administrative detention throughout her incarceration at USP-Lewisburg. Answer of Defendants, J.A. at 71 ¶ 46.

[6] Disciplinary Hearing Officer's Report, J.A. at 19, 22; *see also* Kurzydlo Declaration, J.A. at 15 ¶ 7. Although respondent Kurzydlo specifically cited petitioner's use of the telephone as the reason for the transfer, he also noted at disciplinary charge for "Engaging in a Sexual Act" for which petitioner had not yet received a due process hearing. Request for Transfer, J.A. at 32, 33. In addition, petitioner had previously been charged with "possession, introduction or use of any narcotics," "counterfeiting or forging," "lying or providing a false statement to a staff member," "stealing" and "insolence." BOP Progress Report, J.A. at 28-29.

[7] Amended Complaint, J.A. at 43 ¶ 82; Answer of Defendants, J.A. at 71 ¶ 82.

[8] Answer of Defendants, J.A. at 71 ¶ 63.

[9] Farmer Declaration, J.A. at 107 ¶ 24.

[10] Amended Complaint, J.A. at 43 ¶ 91.

Acting without counsel,[11] petitioner filed a complaint on August 20, 1991 and an amended complaint on December 13, 1991 [12] seeking an injunctive order that the BOP place petitioner in a co-correctional facility [13] and not in a penitentiary setting. Petitioner further sought compensatory and punitive damages for "mental anguish, psychological damage, humil[i]ation, a swollen face, cuts and bruises to her mouth and lips and a cut on her back, as

[11] Petitioner proceeded *pro se* until the appointment of counsel by this Court on November 1, 1993.

[12] The defendants named in the complaint, along with the positions they held at the time and their involvement in petitioner's placement in general population at USP-Terre Haute, are as follows: Michael Quinlan, the Director of the BOP, allegedly failed to establish and implement an effective policy for the housing and designation of transsexual offenders, Quinlan Declaration, J.A. at 96, Amended Complaint, J.A. at 43 ¶¶ 6, 34, Farmer Declaration, J.A. at 107 ¶ 21; Larry DuBois, Regional Director of the North Central Region of the BOP at the time of petitioner's transfer to USP-Terre Haute, authorized the transfer of petitioner to USP-Terre Haute, DuBois Declaration, J.A. at 8 ¶ 1, Amended Complaint, J.A. at 43 ¶¶ 14, 84, Answer of Defendants, J.A. at 71 ¶ 82; N.W. Smith, Correctional Services Administrator of the North Central Region of the BOP at the time of petitioner's transfer to USP-Terre Haute, also authorized the transfer of petitioner to USP-Terre Haute, Smith Declaration, J.A. at 10 ¶ 1 Answer of Defendants, J.A. at 71 ¶ 82; Edward Brennan, Warden at FCI-Oxford, signed the order for petitioner's transfer to USP-Terre Haute, Brennan Declaration, J.A. at 13 ¶ 5; Dennis Kurzydlo, case manager at FCI-Oxford, prepared the Request for Transfer Memorandum recommending that petitioner be transferred to a penitentiary, Kurzydlo Declaration, J.A. at 15 ¶ 7; and Calvin Edwards, Warden at USP-Terre Haute at the time of petitioner's transfer and Regional Director of the North Central Region of the BOP at the time of the filing of petitioner's complaint, was responsible for the care of prisoners at USP-Terre Haute and allegedly allowed petitioner's placement in the general population, Edwards Declaration, J.A. at 93, Amended Complaint, J.A. at 43 ¶ 97. *See also* Amended Complaint and Farmer Declaration, generally.

[13] The BOP formerly operated co-correctional facilities which housed male and female prisoners in separate areas, but allowed coeducational programming.

well as some bleeding" resulting from the assault.[14] Petitioner alleged that each of the respondents knew that petitioner, "who has a feminine appearance, . . . would be sexually assaulted at USP-Terre Haute . . ." [15]

B. Cross-Claims for Summary Judgment

The respondents moved for summary judgment on February 18, 1992. Through their accompanying declarations, all but one respondent generally denied any actual knowledge of the risk of sexual assault facing petitioner.[16] Respondent Brennan, Warden at FCI-Oxford at the time of petitioner's transfer to USP-Terre Haute, did not address whether he knew of the risk to petitioner; instead, he attempted to deny personal involvement in the transfer.[17] Generally speaking, respondents' declarations did not address the question of whether respondents should have known of the risk to petitioner created by her placement in general population at USP-Terre Haute.[18]

[14] Amended Complaint, J.A. at 43 ¶ 90.

[15] Amended Complaint, J.A. at 43 ¶¶ 92-97; Farmer Declaration, J.A. at 107 ¶ 26.

[16] Smith Declaration, J.A. at 10 ¶ 3; Edwards Declaration, J.A. at 93 ¶¶ 4, 5, 6; Quinlan Declaration, J.A. at 96 ¶ 5; DuBois Declaration, J.A. at 8 ¶ 3; Brennan Declaration, J.A. at 13 ¶ 6; Kurzydlo Declaration, J.A. at 15 ¶ 11.

[17] Respondent Brennan's declaration contained the following:

> [T]o the best of my knowledge, I had no direct personal involvement in any of the matters alleged in [petitioner's] Complaint, *except for signing the Transfer Order* dated March 7, 1989. This order authorized transfer of inmate Farmer from FCI, Oxford to United States Penitentiary, Terre Haute, Indiana for disciplinary purposes.

Brennan Declaration, J.A. at 13 ¶ 5 (emphasis added).

[18] The two arguable exceptions were the declarations of USP-Terre Haute Warden Edwards and FCI-Oxford Case Manager Kurzydlo. Edwards' declaration states as follows:

> I had no reason to believe that inmate Farmer could not function safely within the general population at USP-Terre

Petitioner filed a cross-claim for summary judgment and affidavit in opposition to respondents' summary judgment motion and a brief for summary judgment.[19] Petitioner alleged that her transsexuality was known to the BOP by virtue of her feminine appearance, documentation in BOP records, and prior litigation.[20] Indeed, respondents conceded in their Answer to the Complaint that the BOP's "medical and psychiatric personnel diagnosed plaintiff as transsexual" and that "records comp[il]ed and maintained

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Haute, and I believe the unit team acted appropriately in its determination of placement.

Edwards Declaration, J.A. at 93 ¶ 7.

However, when Edwards was the warden at USP-Lewisburg, he had affirmatively argued that housing petitioner in general population at USP-Lewisburg would pose a serious risk of harm. *See Farmer v. Carlson*, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988); *see also infra* discussion at 7-8.

Respondent Kurzydlo, case manager at FCI-Oxford at the time of petitioner's transfer, declared as follows:

> In my professional opinion, the correctional staff at USP Terre Haute were well equipped to handle the problems and needs presented by this inmate, and I relied upon my evaluation and recommendation to transfer Farmer from FCI, Oxford to USP Terre Haute.

Kurzydlo Declaration, J.A. at 15 ¶ 10.

[19] Affidavit of Dee Farmer, J.A. at 105; Plaintiff's Cross-Claim for Summary Judgment, dated March 18, 1992; Plaintiff's Memorandum in Support of Cross-Claim for Summary Judgment, dated March 18, 1992; Preliminary Opposition to Defendants' Motion for Summary Judgment, dated March 18, 1992.

[20] Farmer Declaration, J.A. at 107 ¶¶ 4-7, 13, 15, 16, 19. In a prior, separate action, petitioner had challenged the Bureau's failure to provide medical treatment for her transsexualism. *Farmer v. Haas, Brennan and DuBois*, No. 90-1088, 1991 U.S. App. LEXIS 3549 (7th Cir. March 1, 1991). In reversing the district court's grant of summary judgment for defendants, the Court of Appeals found that respodents Brennan and DuBois had knowledge of petitioner's transsexualism based upon her treatment history and diagnosis by medical personnel at the BOP. *Id.* at *17. Indeed, the Court noted that defendants Brennan and DuBois "conceded that they were well aware of Farmer's condition." *Id.* at *6.

by the Bureau of Prisons describe plaintiff as a non-violent, passive aggressive individual who projects feminine characteristics." [21]

Petitioner also alleged that respondents knew of the risk of harm she confronted as a transsexual in an all-male penitentiary.[22] She pointed to a psychological report prepared by the BOP in August 1986 which "stated that [petitioner] would be subject to a great deal of sexual pressure . . . because of [her] youth and feminine appearance." [23] She also noted that respondents had admitted in their answer that transsexual prisoners present "unique management problem[s]" for prison officials and cited to a BOP Health Service Manual which provided that transsexuals were to be placed in co-correctional facilities.[24] In addition, petitioner cited an earlier case she had brought against the BOP and respondent Edwards, who was then warden of USP-Lewisburg,[25] where petitioner

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[21] Answer of Defendants, J.A. at 71 ¶¶ 25, 26, 86. Petitioner's transsexualism was also documented for prison officials at FCI-Oxford through a psychological questionnaire completed in February 1988 and an "administrative remedy" filed by petitioner with respondent Brennan requesting medical treatment. Farmer Declaration, J.A. at 107 ¶¶ 4, 11. Petitioner further alleged that respondents Brennan, Kurzydlo, DuBois, Smith and Edwards were on notice of petitioner's transsexuality based upon disciplinary charges filed against her at FCI-Oxford for, *inter alia*, wearing her T-shirt off one shoulder and attempting to introduce female hormones into the institution. Farmer Declaration, J.A. at 107 ¶ 16.

[22] Farmer Declaration, J.A. at 107 ¶¶ 4, 6, 8, 11-14, 21.

[23] Farmer Declaration, J.A. at 107 ¶ 4.

[24] Amended Complaint, J.A. at 43 ¶ 30; Farmer Declaration, J.A. at 107 ¶ 21. The respondents' answer admitted this, but alleged that the manual provision had been changed. Answer of Defendants, J.A. at 71 ¶ 28, 30.

[25] At the time of the events involved in this action, respondent Edwards was warden of USP-Terre Haute. He had previously been warden of USP-Lewisburg. The BOP rates USP-Lewisburg one security level higher than USP-Terre Haute. Both institutions are

was housed at the time.[26] In that case, the district court cited respondent Edwards' declaration which, in turn, had adopted the following staff report, which was addressed to petitioner, in justifying her placement in administrative segregation:

> Where a threat to security exists, staff may take reasonable steps to alleviate a threat. In your case, *institutional staff finds that a situation exists which may endanger your life in the general population.* While steps are being taken to move you to a facility where extra security will not be necessary, *it is appropriate to keep you separated from anyone who may harm you.*

See Farmer v. Carlson, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988) (emphasis added) (hereinafter *Carlson*). The district court in *Carlson* deferred to prison officials' decision to place petitioner in administration segregation at USP-Lewisburg, reasoning that "clearly, placing plaintiff, a twenty-one year old transsexual, into the general population at Lewisburg, a Level Five security institution, could pose a significant threat to internal security and to plaintiff in particular." *Id.*

In addition to her cross-claim for summary judgment and her opposition to respondents' motion for summary judgment, petitioner filed a motion and an accompanying affidavit pursuant to Fed. R. Civ. P. 56(f) requesting an extension of time to file a comprehensive motion in opposition.[27] Petitioner argued that respondents' failure to provide discovery pursuant to her second request for production of documents prevented her from establishing that respondents should have known of the risk of harm she faced in the general population at USP-Terre Haute:

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maximum security penitentiaries, unlike the facilities at FCI-Oxford and FCI-El Reno.

[26] Farmer Declaration, J.A. at 107 ¶ 6.

[27] Motion by Plaintiff Per Rule 56(f), J.A. at 103; Affidavit of Dee Farmer, J.A. at 105.

> The documents responsive to my production request are necessary for the preparation of my response to the defendants' motion for summary judgment. . . . The documents are expected to show that each defendant had knowledge that USP-Terre Haute was and is, a violent institution with a history of sexual assaults, stabbings, etc. The evidence is further expected to show that each defendant showed reckless disregard for my safety by designating me to said institution knowing that I would be sexually assaulted.[28]

C. Lower Court Opinions

The district court denied petitioner's Rule 56 motion and granted summary judgment to respondents on March 23, 1992. Since petitioner had not actually expressed concern for her safety to any of the respondents, the district court concluded that respondents had no knowledge of any potential danger to petitioner and were therefore not deliberately indifferent to her safety.[29]

In reaching its holding, the district court relied on *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992) (hereinafter *McGill*), which, in turn, had relied on *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (hereinafter *Franzen*). In defining "deliberate indifference," both *McGill* and *Franzen* adopted a "*criminal* recklessness" standard: prison officials are liable for failure to protect an inmate only if they "had *actual knowledge* of impending harm easily preventable,

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[28] Affidavit of Dee Farmer, J.A. at 105 ¶ 3.

[29] District Court Order, J.A. at 120, 124. In its order, the district court made no reference to the declaration of respondent Brennan, the warden of FCI-Oxford who signed petitioner's transfer order on March 7, 1989. *See* Brennan Declaration, J.A. at 13 ¶ 5. As stated above, Warden Brennan's declaration did not deny knowledge of the risk of sexual assault facing petitioner.

so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Franzen*, 780 F.2d at 653 (emphasis added); *accord McGill*, 944 F.2d at 348.[30] In applying the actual knowledge standard, the district court thus treated the issue of whether respondents should have known of the risk of harm confronting petitioner as legally irrelevant to petitioner's Eighth Amendment claim.

The court of appeals denied petitioner's motion for leave to appeal *in forma pauperis* and summarily affirmed the district court's order on August 7, 1992.

SUMMARY OF THE ARGUMENT

This Court has previously determined that when prison officials are deliberately indifferent to their affirmative duty to protect the physical safety of prisoners, they violate the Eighth Amendment. This case asks the Court to define that deliberate indifference standard.

This task is simplified because the Court has already defined deliberate indifference, albeit in a different context. In *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) (hereinafter *Canton*), this Court held that municipalities are liable under 42 U.S.C. § 1983 when policymakers are deliberately indifferent. The deliberate indifference standard adopted in *Canton* requires the municipality to take action in response to obvious risks that are likely to result in the violation of constitutional rights.

The *Canton* deliberate indifference standard should be adopted in failure to protect cases because this standard effectuates the meaning and purpose of the Eighth Amendment. On the one hand, the *Canton* standard, in conjunction with the various other defenses available to prison

[30] The *McGill* court specifically stated that a prisoner normally proves actual knowledge by showing that he complained to prison officials about a specific threat to his safety. 944 F.2d at 349.

staff, will impose monetary liability only in very limited circumstances, that is, only when prison officials have ignored obvious and significant risks that were in their power to address. On the other hand, the *Canton* standard will ensure that federal courts retain the power to grant injunctive relief when prison officials ignore obvious risks, such as those posed by a potential tuberculosis epidemic or a serious fire hazard.

The *Canton* standard was adopted to reflect the doctrinal requirement that municipal liability for "policy" should be imposed only when the municipality has made a "deliberate" choice. Accordingly, it is an "intent" standard, reflecting the lowest degree of culpability within the legal category of "deliberate" states of mind. It therefore meets the doctrinal requirement expressed in *Wilson v. Seiter*, 111 S.Ct. 2321 (1991), that Eighth Amendment liability for cruel and unusual "punishment" should be imposed only when "some form of intent" is shown.

The *Canton* standard, and not the "criminal" standard of deliberate indifference adopted by the court below, is the proper intent standard for this case. The criminal standard substantially overlaps with the "malicious and sadistic" intent standard that this Court has adopted for Eighth Amendment use of force cases but has rejected in connection with failure to protect and other conditions of confinement cases. The *Canton* standard, but not the criminal standard, is also consistent both with the traditional usage of deliberate or "conscious" indifference that this Court drew on in *Estelle v. Gamble*, 429 U.S. 97 (1976), and with the deliberate indifference standard used by the great majority of lower federal courts in Eighth Amendment failure to protect cases.

Because respondents were granted summary judgment under the wrong standard for deliberate indifference, this case should be remanded for petitioner to have an opportunity to prove that placing a transsexual prisoner, who

is female in demeanor and appearance, in general population in an otherwise all-male, violent institution posed an obvious—and in this case overwhelming—risk of sexual assault.

ARGUMENT

I. PRISONERS' EIGHTH AMENDMENT RIGHT TO REASONABLE SAFETY IS VIOLATED WHEN PRISON OFFICIALS ARE DELIBERATELY INDIFFERENT TO THEIR SAFETY

A. Prison Administrators Have a Duty to Protect Prisoners

"[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 199-200 (1989).[31] In *DeShaney*, this Court articulated the principle that the Constitution imposes an affirmative duty to provide reasonable safety to those confined by the State:

> The rationale for the principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs, *e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. . . . The affirmative duty to protect arises . . . from the limitation which it has imposed on his freedom to act in his own behalf. *See Estelle v. Gamble*, [429 U.S. 97, 103 (1976)].

[31] *See also Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982); *Hutto v. Finney*, 437 U.S. 678, 685-86 (1978).

489 U.S. at 200 (other citations omitted) (emphasis added).[32]

The Eighth Amendment specifically incorporates this affirmative duty to provide prisoners with reasonable safety:

> The [Eighth] Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is reasonable safety. It is cruel and unusual punishment to hold convicted prisoners in unsafe conditions.

Helling v. McKinney, 113 S.Ct. 2475, 2480-81 (1993) (citations and internal quotation marks omitted); *accord Youngberg v. Romeo*, 457 U.S. 307, 316-17 (1982).

This affirmative duty arises from the fact that prison officials control every aspect of prisoners' confinement. They control all of the factors that affect prisoners' safety such as housing, prisoner movement within the facility, and the level of staffing and services available to prisoners, while they prohibit prisoners from taking measures to protect themselves:

> Having incarcerated the individuals, stripped them of all means of self-protection, and foreclosed access to private aid, the state is constitutionally required to provide prisoners with some protection from the dangers to which they are exposed.

Morgan v. District of Columbia, 824 F.2d 1049, 1057 (D.C. Cir. 1987) (citing *Washington v. District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986)).[33]

[32] The *Estelle* Court referred to the common law notion embedded in "contemporary standards of decency" that "[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." *Estelle v. Gamble*, 429 U.S. at 103-04.

[33] *Accord Young v. Quinlan*, 960 F.2d 351, 361-362 (3rd Cir. 1992); *Redman v. County of San Diego*, 942 F.2d 1435, 1444-45

B. The Failure to Protect Prisoners Violates the Eighth Amendment When it Amounts to Deliberate Indifference

This Court's cases establish that the Eighth Amendment is violated by conduct that involves the unnecessary and wanton infliction of pain. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). To meet that standard, a prisoner must show both an "objective component" regarding the seriousness of the conditions and a "subjective component." *Wilson v. Seiter*, 111 S.Ct. 2321, 2324 (1991). Proof of the subjective component, which the Court has described as "a culpable state of mind" and as "some form of intent," *id.* at 2324-25, is required in order to show that the challenged conduct was "wanton."

The determination of what conduct can properly be described as "wanton" varies depending on the nature of the Eighth Amendment claim. The use of force by prison staff violates the Eighth Amendment only if force is used "maliciously and sadistically." *Whitley*, 475 U.S. at 320-21; *see also Hudson v. McMillian*, 112 S.Ct. 995, 999 (1992). In contrast, the Eighth Amendment standard applicable to claims regarding medical care requires a lesser showing: the Eighth Amendment is violated if prison officials display "deliberate indifference to a prisoner's serious illness or injury." *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). *Wilson* extended the "deliberate indifference" standard to all prison conditions of confinement. 111 S.Ct. at 2326-27. In particular, *Wilson* held that Eighth Amendment claims of failure to protect the prisoner's safety are governed by the deliberate indifference standard. *Id.*

(9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 972 (1992); *Fisher v. Koehler*, 692 F. Supp. 1519, 1559 (S.D.N.Y. 1988), *later proceeding aff'd*, 902 F.2d 2 (2d Cir. 1990) (upholding finding of constitutional violation and remedy).

II. PRISON OFFICIALS ARE DELIBERATELY INDIFFERENT WHEN THEY FAIL TO ACT IN RESPONSE TO OBVIOUS AND UNREASONABLE RISKS

A. This Court Defined Deliberate Indifference in *Canton* to Encompass Obvious Risks

The Court has already defined "deliberate indifference" with regard to questions of municipal liability under 42 U.S.C. § 1983. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) (hereinafter *Canton*). In that case, the Court held that a failure to train employees could constitute a municipal policy under *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), if the municipality was deliberately indifferent to constitutional rights:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is *so obvious*, and the inadequacy *so likely to result in the violation of constitutional rights*, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.[10]

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[10] For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), can be said to be "*so obvious*," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been *plainly obvious* to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

Canton, 489 U.S. at 390 (emphasis added). Justice O'Connor's opinion, concurring in part and dissenting in part, agreed with this formulation and added the following:

Where a § 1983 plaintiff can establish that *the facts available to city policymakers put them on actual or constructive notice* that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied. Only then can it be said that the municipality has made "a deliberate choice to follow a course of action . . . from among various alternatives."

* * * *

In my view, it could be shown that the need for training was obvious in one of two ways. First, a municipality could fail to train its employees concerning *a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face.*

* * * *

Second, I think municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could *put the municipality on notice* that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements. The lower courts that have applied the "deliberate indifference" standard we adopt today have required a showing of a pattern of violations from which a kind of "tacit authorization" by city policymakers can be inferred.

Id. at 396-97 (emphasis added) (citations omitted).

Accordingly, deliberate indifference for constitutional purposes encompasses the failure of government officials or entities to respond to a substantial risk of constitutional violations when: 1) they know about the risk; 2) they are on constructive notice of the risk; or 3) the risk is "obvious" to the relevant officials given the positions they occupy and the duties they and their subordinates perform.

Two main points emerge from the *Canton* majority and concurring opinions. First, the relevant inquiry involves the officials' actual or constructive notice of a threat to the class of persons within the scope of the risk. Second, the Court's reference to an "obvious" need for training indicates that the plaintiff need not prove that the officials realized that the risk of harm to the class of potential plaintiffs required action. If a risk to a class of persons is obvious, officials or entities may be held liable for the failure to protect members of that class, even if a particular person's exposure to the risk was not directly known to them.

Canton thus cannot be reconciled with an argument that in order for officials to be deliberately indifferent, plaintiff must prove that the officials knew of a threat to a particular person. Insofar as the district court in this case applied an "actual knowledge" standard, it applied a rule that is significantly more restrictive than *Canton*'s standard, and is therefore erroneous.

Under *Canton*, a risk created by the failure to protect a prisoner may be "obvious" for several reasons. First, a risk may be obvious because it was specifically communicated to the defendants. In this category would be credible reports by the intended victim of threats made to him or her.

A second category of "obvious" risks would include cases in which prisoner assaults were so common in particular circumstances that prison officials would have to be charged with knowledge that placing a prisoner in that circumstance would lead to an unreasonable risk of assault. *Cf. Ramos v. Lamm*, 639 F.2d 559, 572-73 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (because of inadequate staff and poor facility design, violence and fear permeated the prison population and the efforts of many prisoners were "directed at merely staying alive while they serve[d] their sentences").

Third, a risk may be so obvious that a federal court need not wait for the inevitable tragedy to occur prior to affording injunctive relief. For example, a federal court must be able to enjoin a prison from providing prisoners with contaminated water or infected blankets because the unreasonable risk from such actions is obvious even before any sickness occurs.[34] Similarly, mingling aggressive and victim-prone prisoners in an open dormitory, or failing to supervise high-security prisoners, should be subject to injunctive relief before the first prisoner dies. *Cf. Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 560-61 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988) (finding deliberate indifference with regard to murder of mentally ill prisoner housed in general population; officials had failed to follow court order requiring segregation and treatment of mentally ill prisoners).

Of course, some risks may be "obvious" but so trivial that they do not support a constitutional claim of deliberate indifference. As a threshold matter, therefore, there must be some allegations that the conduct of prison officials (either by omission or commission) "pose[s] an unreasonable risk of serious damage to . . . future health" and thus violates the objective component of the Eighth Amendment. *See Helling*, 113 S.Ct. at 2481. That standard is easily met in this case by petitioner's allegation that respondents' decision to place her in the general population of a maximum security prison predictably led to her assault and rape.

Finally, under *Canton*, when a defendant is on notice of an obvious and unreasonable risk of harm, the defendant must take those steps reasonably within his or her power to address the risk. It is precisely that failure to act in the face of an obvious risk that petitioner has challenged in this case.

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[34] *See* discussion in *Helling v. McKinney*, 113 S.Ct. 2475, 2480-81 (1993).

B. The *Canton* Standard Is Consistent with the Eighth Amendment Mental Element Requirement

As noted above, an Eighth Amendment violation involves both an objective and subjective component. The subjective component of an Eighth Amendment prison conditions claim requires proof of "some mental element" on the part of the "inflicting officer." This is because the word "punishment" in the text of the Amendment itself implies a deliberate act or choice. *Wilson v. Seiter*, 111 S.Ct. at 2325.

The *Canton* standard meets this state of mind requirement. Indeed, *Canton*'s reasoning concerning the "policy" requirement is parallel to *Wilson*'s reasoning regarding the word "punishment."

> [M]unicipal liability under § 1983 attaches where —and only where—a deliberate choice to follow a course of action is made from among various alternatives by city policymakers. Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality—a "policy" as defined by our prior cases—can a city be liable for such a failure under § 1983.

489 U.S. at 389 (internal quotation marks and citations omitted).[35] Thus, the essential element of deliberate choice is common to the reasoning of both *Canton* and *Wilson*.

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[35] The *Canton* majority recognized the tension in finding that a municipality's disregard of risks was deliberate:

> The issue in a case like this one . . . is whether [a] training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." *It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees.*

489 U.S. at 390 (emphasis added). This apparent tension highlights that "deliberate indifference" is a legal term of art. *Cf. Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) ("deliberate indifference" is an "oxymoron").

Wilson itself acknowledged this correspondence. Immediately after its reference to "some form of intent," the Court added, "*cf. Canton v. Harris,* 489 U.S. [at 390 n.10]." 111 S.Ct. at 2325. The citation is to the *Canton* footnote, quoted above at 15, which refers to risks that are "so obvious" that policymakers' failure to act on them can properly be characterized as deliberately indifferent. Thus, *Wilson* itself supports the view that the *Canton* standard constitutes "some form of intent." [36]

Wilson, in referring to "some form of intent," uses "intent" as a legal term of art encompassing a range of mental states. It does so consistently with the traditional understanding of "intent" in American jurisprudence. Deliberate indifference— also referred to as "conscious" indifference—is treated as equivalent to "willful," "wanton," or "reckless" conduct. It is classified as a "quasi-intent" standard qualitatively different from ordinary lack of care "which is so far from a proper state of mind that it is treated in many respects" as equivalent to actual intent to do harm. Prosser & Keeton, *The Law of Torts* § 34 at 212-13 (5th ed. 1984).[37] The "usual meaning" of "willful," "wanton," or "reckless" is that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." Conscious indifference or willfulness is established when a defendant "has proceeded in disregard of a high and excessive degree of danger, *either known to him or apparent to a reasonable person in his position.*" *Id.* at 213-14 (emphasis added); [38] *cf. Canton,* 489 U.S. at 396 (O'Connor, J., concurring in part and dissenting in part) (when policymakers have actual or constructive notice that a particular omission is substantially certain to lead to constitutional violations, municipality has made a "deliberate choice").

This view is also supported by *Smith v. Wade,* 461 U.S. 30 (1983), which in the context of a punitive damages instruction, canvassed the meaning of "wantonness" (a term the Court characterized as relatively free of ambiguity or confusion):

> Wanton means reckless—without regard to the rights of others . . . . Wantonly means causelessly, without restraint, and in reckless disregard of the rights of others. Wantonness is defined as a licentious act of one man towards the person of another, without regard to his rights; it has also been defined as the conscious failure by one charged with a duty to exercise due care and diligence to prevent an

[36] *See also City of Springfield, Mass. v. Kibbe,* 480 U.S. 257, 268-69 (1987) (O'Connor, J., dissenting), suggesting that the deliberate indifference standard incorporates a cognitive element that negligence, even heightened negligence, lacks:

> [I]n my view the "inadequacy" of police training may serve as the basis for § 1983 liability only where the failure to train amounts to a reckless disregard for or deliberate indifference to the rights of persons within the city's domain. The "causation" requirement of § 1983 is a matter of statutory interpretation rather than of common tort law. Analogy to traditional tort principles, however, shows that the law has been willing to trace more distant causation when there is a cognitive component to the defendant's fault than when the defendant's conduct results from simple or heightened negligence.

(Citation omitted).

[37] *Canton* distinguishes its deliberate indifference standard from gross negligence. *See* 489 U.S. at 388 n.8.

[38] This reliance on tort law is not inconsistent with the Court's expressed concern that the Constitution not become a "font of tort law." *Paul v. Davis,* 424 U.S. 693, 701 (1976). The Court's concern in *Paul* was that the interest asserted by the plaintiff was simply not one that the Constitution protects. By contrast, the right to personal safety in prison is at the heart of the interests protected by the Eighth Amendment. *See supra* § I.A. The concepts and definitions of tort law underlie much of constitutional adjudication. *See, e.g., Monroe v. Pape,* 365 U.S. 167, 187 (1961) (liability under § 1983 is "a species of tort liability").

> injury after the discovery of the peril, *or under circumstances where he is charged with a knowledge of such peril*, and being conscious of the inevitable or probable results of such failure.

Id. at 40 n.8 (emphasis added) (quoting 30 *American and English Encyclopedia of Law* 2-4 (2d ed. 1905)) (emphasis added). Under the Eighth Amendment, *"wanton"* is the term that sums up the subjective element of the claim. *Wilson*, 111 S.Ct. at 2326. *Smith* shows that a formulation virtually identical to the *Canton* standard is part of the long-settled and accepted understanding of "wanton." Thus, *Canton's* definition of deliberate indifference is one of the "culpable states of mind" that may support a claim under the Eighth Amendment.

In short, deliberate indifference is a "culpable state of mind," albeit less culpable than the "very high state of mind" required in use of force cases. *Wilson*, 111 S.Ct. at 2326. It is precisely because deliberate indifference falls within the category of "intentional" states of mind that it was adopted in *Canton* to distinguish acts that are chargeable to municipalities as "policy" from acts that are not so chargeable. Moreover, it would be deeply anomalous if "deliberate indifference" had one meaning with respect to municipal liability and another with respect to Eighth Amendment challenges.[39] No Supreme Court

[39] In *Collins v. City of Harker Heights, Tex.*, 112 S.Ct. 1061, 1069 (1992), the Court noted the distinction between using deliberate indifference as the substantive standard for liability under the Eighth Amendment and using the standard for identifying whether a municipality was constitutionally responsible for acts of its agents. In *Collins*, however, the purpose of drawing the distinction was not to suggest that there are two distinct meanings for the term "deliberate indifference." Rather, the purpose was to point out that a constitutional violation does not arise simply because a municipality was deliberately indifferent; a municipality is only liable when the deliberate indifference leads to a violation of a constitutional right. In *Collins*, no constitutional right was infringed. *Id.*

case has suggested that the definition of "deliberate indifference" applied in *Canton* does not apply to other uses of the term. Indeed, as set forth below, the Court's Eighth Amendment decisions consistently support application of the *Canton* standard.

C. The *Canton* Standard Appropriately Reflects the Purposes of the Eighth Amendment

In *Wilson*, this Court applied the same Eighth Amendment standard to both injunctive and damages actions. 111 S.Ct. at 2324-25. It is likely, therefore, that the deliberate indifference standard adopted by the Court here will also apply to injunctive actions, as well as to all types of conditions of confinement claims, including those involving medical care. *Id.* at 2326. Accordingly, the Eighth Amendment standard adopted in this case can and should take into account the fact that prisoners must often rely on injunctive relief to safeguard their well-being in institutional settings.[40] If the standard is set too high, injunctive relief will become unavailable and prisoners will be left without any meaningful remedy to secure their freedom from harm.

The *Canton* standard is the appropriate standard for determining whether injunctive relief to a class of pris-

[40] Courts have recognized the violent conditions to which prisoners are subjected in the absence of institutional protection. *See, e.g., Redman v. County of San Diego*, 942 F.2d 1435, 1444-45 (9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 972 (1992); *Morgan v. District of Columbia*, 824 F.2d 1049, 1057-58 (D.C. Cir. 1987); *Fisher v. Koehler*, 692 F. Supp. 1519, 1560 (S.D.N.Y. 1988), *later proceeding aff'd*, 902 F.2d 2 (2d Cir. 1990) (upholding finding of constitutional violation and remedy) (widespread violence by aggressive inmates); *LaMarca v. Turner*, 662 F. Supp. 647, 663 (S.D. Fla. 1987), *aff'd in relevant part*, 995 F.2d 1526, 1538 (11th Cir. 1993) (widespread rape and assaults by inmates on inmates); *Holt v. Sarver*, 309 F. Supp. 362, 377 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971), *later proceeding, Hutto v. Finney*, 437 U.S. 678 (1978) (nightly sexual assaults, fights and stabbings committed by "creepers" and "crawlers" against fellow inmates).

oners is justified under the Eighth Amendment because, unlike the Seventh Circuit standard, it guarantees that a federal court will have the power to address a pattern of conduct:

> In institutional level challenges to prison health care, systemic deficiencies can provide the basis for a finding of deliberate indifference. A series of incidents closely related in time may disclose a pattern of conduct amounting to deliberate indifference.

Rogers v. Evans, 792 F.2d 1052, 1058-59 (11th Cir. 1986) (citation omitted). The "series of incidents" and "pattern of conduct" constitute deliberate indifference because in such circumstances, just as in *Canton*, the pattern renders obvious the need to take action without proof of actual knowledge on the part of prison officials. At the same time, the standard urged by petitioner will not expose prison administrators to inordinate liability for the simple reason that the *Canton* standard itself requires "a high degree of fault." 489 U.S. at 396 (O'Connor, J., concurring in part and dissenting in part).[41]

Moreover, in addition to the protection directly provided by the *Canton* standard, existing doctrine already provides prison officials with significant protection against undue liability. For example, the "good faith" qualified immunity defense protects government employees from the threat of liability when they carry out their duties in accordance with a reasonable understanding of existing law, but nonetheless violate the constitutional rights of those with whom they deal. *See, e.g., Harlow v. Fitz-*

[41] In *McGill v. Duckworth*, the Seventh Circuit argued that a "should have known" standard approaches "absolute liability" because staff always know that there is a risk of assault in prison. 944 F.2d at 348. However, the very large body of prisoner assault cases decided under the "should have known" formulation takes as its starting point that "the state is not obliged to insure an assault-free environment" and that it is only "the *unreasonable* threat of violence" that violates the Eighth Amendment. *See Morgan v. District of Columbia*, 824 F.2d at 1057 (emphasis added).

gerald, 457 U.S. 800, 818 (1982) (government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known).

Furthermore, beyond the general "good faith" immunity defense to damages, corrections staff share with other institutional staff an additional good faith defense. In an action in which an individual plaintiff seeks damages, the inability of a particular defendant to take effective action is a defense to liability:

> In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability.

Youngberg v. Romeo, 457 U.S. at 323 (citation omitted).[42]

In addition, other possible reasons for a standard higher than *Canton* are inapplicable. For example, courts are traditionally reluctant to second-guess prison officials' handling of urgent problems such as prison riots that require "split-second" decisions made hastily by administrators and officers acting without the benefit of hindsight. *Whitley*, 475 U.S. at 320, 322; *Dudley v. Stubbs*, 489 U.S. 1034, 1038-39 (1989) (O'Connor, J., dissenting).[43]

Similarly, this Court has given deference to the decisions of prison officials where they make formal policy

[42] The Seventh Circuit reasoned that the "should have known" standard would "allow[] plaintiffs to tax employees of the prison system with the effects of circumstances beyond their control." *McGill v. Duckworth*, 944 F.2d at 349. *Youngberg* demonstrates why this argument is erroneous.

[43] *Whitley* explicitly applied a higher standard under the Eighth Amendment to use of force cases because of the need for greater deference to official discretion in this area.

decisions relying on their special expertise regarding prison security. *See, e.g., Pell v. Procunier,* 417 U.S. 817, 824 (1974) (media challenge to restrictions on prisoner interviews).

This case, however, involves neither a prison riot, with its need for split-second decisions, nor a policy judgment, with its suggestion of reasoned deliberation. To the contrary, the claim of petitioner and others in her position is that the respondents *failed* to exercise their judgment and expertise, and that petitioner was injured as a result. When a constitutional challenge arises from the failure of prisoner officials to execute their duties, heightened deference is not required.

For these reasons, the standard petitioner proposes appropriately balances the affirmative duty to protect the lives and health of prisoners. Anything else would render that duty a chimera.

D. The Criminal Recklessness Standard Adopted Below Conflicts With the Purposes of the Eighth Amendment

In contrast to *Canton,* the Seventh Circuit standard of criminal recklessness or actual knowledge would inappropriately shield prison officials from responsibility in a variety of circumstances. It would immunize prison officials' failure to adopt a procedure for identification of prisoners with tuberculosis if it is found that they did not actually know that such a failure would lead to harm in a particular case, notwithstanding that the risk of harm is obvious. Similarly, it would immunize prison officials' failure to adopt any fire-safety measures, if it is found that they did not actually know of the unreasonable risk of fire in a particular case. It would also immunize prison officials' decision to house a young, slight, first-time offender in a general population cell with a prisoner with a history of predatory sexual crimes against cellmates, so long as it is found that the officials did not actually know of the

threat of assault in that case. *Cf. Redman v. County of San Diego,* 942 F.2d 1435 (9th Cir. 1991) (en banc), *cert. denied,* 112 S.Ct. 972 (1992).

Precisely because the same standard will apply to both damages and injunctive claims, the Seventh Circuit standard would allow prison officials to wait until prisoners have actually contracted tuberculosis, or until fires have broken out, or until a vulnerable prisoner at obvious risk is actually attacked or tells prison officials that he has been threatened, before they could be required to take any action. In each of these examples, the risk is so great as to be obvious yet the Seventh Circuit standard would not authorize damages or injunctive relief unless prison officials actually knew of the risk.

Far from simply immunizing the inadvertent or negligent actions of prison officials, the Seventh Circuit standard encourages prison officials to take refuge in the zone between "ignorance of obvious risks" and "actual knowledge of risks." Adoption of a standard that creates such a refuge rewards inattention by prison officials to prisoner safety.[44] This is particularly inappropriate in an environment where prison rules and operations deprive prisoners of the capacity to make their own decisions regarding personal safety, *see supra* § I.A. Under such circumstances, this Court should not adopt a standard that *discourages* prison officials from recognizing risks of harm.[45]

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[44] Petitioner recognizes that some cases adopting a criminal recklessness standard indicate that an "ostrich-like" failure to acquire knowledge is to be treated as the equivalent of actual knowledge. *See, e.g., McGill v. Duckworth,* 944 F.2d 344, 351 (7th Cir. 1991), *cert. denied,* 112 S.Ct. 1265 (1992). But proof that prison officials deliberately avoided knowledge will be extraordinarily difficult. A requirement of such proof could prevent federal courts from intervening in injunctive actions where failure to intervene will entail massive human suffering, as in the tuberculosis example.

[45] This is not to suggest that the standard imposes liability for negligent inattention. Neither the *Canton* standard nor the criminal standard imposes such liability. In light of this, the Court should

III. PRIOR DECISIONS OF THIS COURT, AND THE GREAT MAJORITY OF THE OPINIONS OF THE COURTS OF APPEALS, SUPPORT APPLICATION OF THE *CANTON* DELIBERATE INDIFFERENCE STANDARD

A. This Court's Eighth Amendment Cases Support Application of the *Canton* Standard

1. *Estelle v. Gamble*

The Court first applied the deliberate indifference standard to Eighth Amendment jurisprudence in *Estelle v. Gamble*, 429 U.S. 97 (1976), holding that deliberate indifference to serious medical needs of a prisoner violates the Eighth Amendment. *Estelle* did not directly define "deliberate indifference," other than by stating that it is more than negligence.[46] Rather, *Estelle* relied on and endorsed the standard adopted by a number of lower court decisions:

> The Courts of Appeals are in essential agreement with this standard [for deliberate indifference]. All agree that mere allegations of malpractice do not state a claim, and, while their terminology regarding what is sufficient varies, their results are not inconsistent with the standard of deliberate indifference.

Id. at 106 n.14.

The Court then cited cases from the lower courts, starting with *Page v. Sharpe*, 487 F.2d 567 (1st Cir. 1973). That case held that a denial of medical care to a prisoner is actionable only if the complaint alleges either

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reject the criminal standard because, unlike the *Canton* standard, the criminal standard actively *discourages* vigilance.

[46] Petitioner does not argue that merely negligent failure to protect violates the Constitution. This Court has already held that such negligence does not violate the Due Process Clause. *Davidson v. Cannon*, 474 U.S. 344 (1986). *Wilson v. Seiter* removed any doubt that the same rule applies under the Eighth Amendment. 111 S.Ct. 2321.

an intent to harm the prisoner or "an injury or illness so severe *or obvious* as to require medical attention." *Id.* at 569 (emphasis added). Thus, the case endorsed what would now be considered the *Canton* standard. The *Estelle* Court also cited a footnote from *Newman v. Alabama*, 503 F.2d 1320, 1330 n.14 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975), in which the *Newman* court indicated that an Eighth Amendment violation regarding prison medical care requires "evidence of rampant and not isolated deficiencies . . . due to callous indifference." The court did not indicate that actual knowledge was required to establish "callous indifference." The court's reference to rampant or systemic[47] medical deficiencies is consistent with *Canton*, which, as noted, held that deliberate indifference can be shown when employees "so often violate constitutional rights" that the need for action is "obvious." *Canton*, 489 U.S. at 390 n.10.

The *Estelle* Court also cited *Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir. 1976), which held as follows:

> A prisoner states a proper cause of action when he alleges that prison authorities have denied reasonable requests for medical treatment in the face of an *obvious* need for such attention where the inmate is thereby exposed to undue suffering or the threat of tangible residual injury.

(Footnote omitted) (emphasis added).

Finally, the *Estelle* Court cited *Dewell v. Lawson*, 489 F.2d 877, 881-82 (10th Cir. 1974), in which the plaintiff brought an Eighth Amendment action alleging that the sheriff had failed to establish proper procedures and to train personnel, with the result that the diabetic plaintiff suffered brain damage following arrest. These facts are quite similar to the facts in *Canton* itself; nothing in the *Dewell* facts suggests that the sheriff knew of the plain-

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[47] *See also Newman*, 503 F.2d at 1331-32.

tiff's particular circumstances and consciously failed to take action in that particular case. Rather, as in *Canton*, plaintiff's claim suggested indifference to the danger created to a class of persons that defendants should have known would inevitably be at risk.

Thus, *Estelle*, in adopting the deliberate indifference standard, relied on an established understanding in the lower courts [48] that is substantially identical to the standard later articulated in *Canton* and is also consistent with the above-described tort law understanding of the terms "willful," "wanton," and "reckless," and the concept of "conscious indifference." *See supra* § II.B. This understanding, and these cases, cannot be reconciled with the "actual knowledge" standard applied by the Seventh Circuit.

2. *Whitley v. Albers*

In *Whitley v. Albers*, 475 U.S. 312 (1986), this Court held that, in all cases that involve conduct not purporting to be punishment, the conduct must be "wanton" in order to violate the Eighth Amendment. Furthermore, whether conduct is wanton must be determined "with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Id.* at 320.

The Court went on to hold that the "deliberate indifference" standard applicable to Eighth Amendment claims of failure to attend to serious medical needs, set forth in *Estelle*, does not apply to prison use of force claims. Rather, in use of force cases, the issue is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-21 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973)).

[48] The other cases cited in note 14 of *Estelle* are at least consistent with the *Canton* standard.

Significantly, in explaining what the "maliciously and sadistically" standard of *Whitley* meant, the Court cited *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986), which adopted the criminal recklessness standard at issue in this case. *Whitley*, 475 U.S. at 321. This citation highlights the fact that the standard for use of force adopted in *Whitley* blurs significantly with the criminal recklessness standard adopted below.[49] The *Whitley* Court stated that application of the use of force standard includes a determination of "whether the use of force . . . evinced such wantonness with respect to the unjustified infliction of harm *as is tantamount to a knowing willingness that it occur*." 475 U.S. at 321 (emphasis added). When one acts with *Franzen*'s *actual knowledge* of the risk of harm, one also acts with *Whitley*'s "knowing willingness that [the harm] occur."

Accordingly, in order to preserve the *Whitley* distinction between the higher standard applicable to use of force cases on the one hand, and failure to protect and other conditions of confinement cases on the other, this Court should reject the Seventh Circuit deliberate indifference standard.[50]

[49] In *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992), the court stated that actions taken *because* of the likely harm are done with deliberate indifference, whereas those taken *in spite of* the harm are not. This characterization of the criminal recklessness standard is entirely indistinguishable from the use of force standard adopted in *Whitley*. One acts *because* of the likelihood of harm when one acts out of a motivation to bring about the harm, and the action is therefore taken "maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-21.

[50] The standard urged by petitioner is consistent with the dissent from denial of certiorari in *Dudley v. Stubbs*, 489 U.S. 1034 (1989) (O'Connor, J.). In that case, the plaintiff, a prisoner, was beaten severely by a group of prisoners. Staff did not intervene, claiming that under the particular circumstances of the case they could not interfere because of the possibility that to do so would allow the

3. *Wilson v. Seiter*

Wilson v. Seiter, 111 S.Ct. 2321 (1991), held that the deliberate indifference standard applies to all Eighth Amendment prison conditions of confinement claims. *Id.* at 2326-27. Moreover, the Court specifically held that Eighth Amendment claims involving a failure to protect the prisoner are not subject to the higher standard applicable to use of force cases and are judged under the same deliberate indifference standard as medical claims:

> [W]e see no significant distinction between claims alleging inadequate medical care and those alleging inadequate "conditions of confinement." Indeed, the medical care a prisoner receives is just as much a "condition" of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, *and the protection he is afforded against other inmates*. . . . Thus . . . it is appropriate to apply the deliberate indifference standard articulated in *Estelle*.

Id. (emphasis added) (quotation marks and citations omitted).

In this connection, it is important to note that *Wilson* did not itself define the deliberate indifference standard; rather, it explicitly adopted the deliberate indifference standard articulated in *Estelle*. 111 S.Ct. at 2327. As

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prisoners pursuing the plaintiff to gain access to the prison arsenal and superintendent's office. *Id.* at 1034-35. Justice O'Connor dissented on the ground that the case should have been governed by the *Whitley* malice standard rather than the deliberate indifference standard applied by the lower court because the situation, like *Whitley*, involved the necessity of a split-second decision; indeed, the situation in *Dudley* was "arguably more dangerous" than the disturbance in *Whitley*. *Id.* at 1038.

Dudley involved the question of the appropriate place to draw the line between use of force and failure to protect claims. This case, which does not involve any allegations of use of force by prison officials, is obviously appropriately placed in the "failure to protect" category.

shown in § III.A.1. above, *Estelle* in turn relied on case law consistent with the *Canton* standard rather than the Seventh Circuit standard.

In addition, *Wilson*, 111 S.Ct. at 2327, cited with approval lower court authority consistent with Canton. The Court cited *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 560 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988), a prisoner assault case in which the court upheld a jury instruction that the defendants' failure to act could constitute deliberate indifference "in the sense that the official had knowledge of *or should have known of* a pervasive risk of harm to inmates." (Emphasis added). The Court also cited *Morgan v. District of Columbia*, 824 F.2d 1049, 1057-58 (D.C. Cir. 1987), also a prisoner assault case, in which liability was upheld based on an "obvious unreasonable risk of violent harm . . . which is known to be present or should have been known." [51]

The *Wilson* Court also cited with approval cases "routinely appl[ying] the 'deliberate indifference' requirement to claims of prisonwide deprivation of medical treatment." 111 S.Ct. at 2324 n.1 (citing *Toussaint v. McCarthy*, 801 F.2d 1080, 1111-13 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *French v. Owens*, 777 F.2d 1250, 1254-55 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986)). Such cases hold that deliberate indifference may be established by showing " 'repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff' or by showing 'systematic or gross deficiencies in staffing, facilities, equipment or procedures.' " *French v. Owens*, 777 F.2d at 1254 (quoting

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[51] *Cortes-Quinones* and *Morgan* are two of the five cases cited in *Wilson* to illustrate the deliberate indifference standard. The other three do not discuss the definition of deliberate indifference. *See Lopez v. Robinson*, 914 F.2d 486, 492 (4th Cir. 1990); *Givens v. Jones*, 900 F.2d 1229, 1234 (8th Cir. 1990); *LaFaut v. Smith*, 834 F.2d 389, 391 (4th Cir. 1987). All five cases are consistent with the *Canton* standard. Significantly, not a single one of the five cases applied a criminal recklessness standard.

Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981)). They do not address the actual knowledge of prison officials; rather, they address the widespread or systemic character of objective conditions, which can make the risk of harm "obvious," *Canton*, 489 U.S. at 390, or can constitute "facts available to city policymakers [that] put them on actual *or constructive* notice" of the risk of constitutional violation. *Id.* at 396 (O'Connor, J., concurring in part and dissenting in part) (emphasis added).

Moreover, *Wilson* does not provide support for the Seventh Circuit standard. In reaching its decision to apply a criminal recklessness standard, *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992), relied on the *Wilson* Court's reference to *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986), which had adopted a criminal recklessness standard. However, *Wilson*'s reference to *Franzen* pertained to the general principle that the word "punishment" involves "some mental element." 111 S.Ct. at 2325. The reference appeared in Section I of the opinion, which addressed whether a "state of mind" requirement was even applicable to the case. *See id.* at 2323-26. The reference did not relate to the *content* of that mental element, an issue which was discussed in Section II of the *Wilson* opinion without any mention of *Franzen*. *See id.* at 2326-27. As the *Wilson* opinion did not even specify what standard *Franzen* adopted, it can hardly be interpreted to suggest agreement with that standard.

4. *Helling v. McKinney*

The central question in *Helling v. McKinney*, 113 S.Ct. 2475 (1993), was whether the Eighth Amendment encompasses threats of possible future harm to a prisoner's health, a question the Court answered in the affirmative. *Id.* at 2480. Indeed, the holding of *Helling* is that possible—but not certain—risks of harm to groups of

prisoners are actionable under the Eighth Amendment. For example, prison officials cannot expose prisoners as a group to an unreasonable risk of contagious disease or unsafe water without violating the Eighth Amendment. *See id.*

This portion of the *Helling* opinion was directed at the objective component of the Eighth Amendment—whether the challenged conditions were objectively deficient enough to deprive the prisoner of reasonable health or safety; it was not directed at the subjective state of mind component of deliberate indifference. However, if deliberate indifference requires that prison officials possess "actual knowledge of impending harm easily preventable" [52] before they have any responsibility to act, none of the discussion in *Helling* has any practical relevance. Under the Seventh Circuit's standard, proof of an unreasonable risk of future harm to the health or safety of a group of prisoners could never be deliberate indifference. By definition, such harm would not be "impending" and prison officials would not have actual knowledge that harm *necessarily* would come to any of the prisoners, much less a specific prisoner.[53] Thus, if the Seventh Circuit standard for deliberate indifference is correct, it was pointless for the Court to discuss the objective component in *Helling*, because the prisoner would always lose on the subjective component. For that reason, even though *Helling* does not deal directly with the state of mind component of Eighth Amendment claims, its analysis is consistent with the *Canton* definition of deliberate indifference, but not with the standard adopted in the Seventh Circuit.

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[52] *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 653 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986)).

[53] In addition, such harm may not be "easily preventable." To use one of *Helling*'s examples, ensuring a potable water supply might entail some difficulty or expense. Surely, prisoners may not be required to drink contaminated water for that reason. 113 S.Ct. at 2480.

B. The Majority of Lower Court Cases Has Applied a Formulation of Deliberate Indifference that Is Consistent with *Canton*

Something akin to the standard urged by petitioner has been adopted in the majority of circuits that have expressly addressed the issue of what standard applies to Eighth Amendment failure to protect claims. *See, e.g., Young v. Quinlan,* 960 F.2d 351, 361 (3d Cir. 1992) ("knew or should have known of a sufficiently serious danger"); *Redman v. County of San Diego,* 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc), *cert. denied,* 112 S.Ct. 972 (1992) (knew or should have known of risk); *Berry v. City of Muskogee,* 900 F.2d 1489, 1496 (10th Cir. 1990) (deliberate indifference occurs when conduct or policy "disregards a known or obvious risk that is very likely to result in the violation of a prisoner's constitutional rights"); *Morgan v. District of Columbia,* 824 F.2d 1049, 1058 (D.C. Cir. 1987) ("knew or should have known" of "obvious unreasonable risk"); *Martin v. White,* 742 F.2d 469, 474 (8th Cir. 1984) (reckless disregard shown by existence of pervasive risk of harm and failure by prison officials to reasonably respond to risk); *Stewart v. Love,* 696 F.2d 43 (6th Cir. 1982); *Wade v. Haynes,* 663 F.2d 778, 786 (8th Cir. 1981), *aff'd sub nom. Smith v. Wade,* 461 U.S. 30 (1983) (knew or should have known that attack highly foreseeable); *Ramos v. Lamm,* 639 F.2d 559, 572 (10th Cir. 1980), *cert. denied,* 450 U.S. 1041 (1981) (prisoner has right to reasonable protection and need not wait until actual assault before obtaining relief).[54]

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[54] The same is true of recent medical care cases. *See, e.g., DeGidio v. Pung,* 920 F.2d 525, 532 (8th Cir. 1990) (liability can be based on a "known or obvious risk"); *Miltier v. Beorn,* 896 F.2d 848, 851-52 (4th Cir. 1990) ("A defendant acts recklessly by disregarding a substantial risk of danger that is either known to the defendant or which would be apparent to a reasonable person in the defendant's position"); *Greason v. Kemp,* 891 F.2d 829, 839-40 (11th Cir. 1990) (warden who knew or should have known about inadequate psychiatric staffing could be held liable for consequences).

These cases have fashioned a standard similar to that urged by petitioner. For example, in *Young v. Quinlan,* 960 F.2d 351, 361 (3d Cir. 1992), the court described the standard as follows:

> "should have known" [d]oes not refer to a failure to note a risk that would be perceived with the use of ordinary prudence. It connotes something more than a negligent failure to appreciate the risk . . ., though something less than subjective appreciation of that risk. The strong likelihood of [harm] must be so obvious that a lay person would easily recognize the necessity for preventative action; the risk of . . . injury must be not only great, but also sufficiently apparent that a lay custodian's failure to appreciate it evidences an absence of any concern for the welfare of his or her charges.

(Internal quotation marks and citation omitted).

The cases adopting a criminal recklessness standard for failure to protect cases are primarily from the Seventh Circuit. *See McGill,* 944 F.2d at 348, and cases cited therein; *see also Ruefly v. Landon,* 825 F.2d 792 (4th Cir. 1987); *LaMarca v. Turner,* 995 F.2d 1526 (11th Cir. 1993). Even these courts have displayed some uneasiness with the reach of the criminal standard by indicating that, in some circumstances, prison officials' knowledge of a risk of harm can be inferred. For example, in *Goka v. Bobbitt,* 862 F.2d 646, 651 (7th Cir. 1988), the court stated that the risk of violence must be known to the defendants, but also stated that "[t]o establish an Eighth Amendment violation, Goka must show that the defendants either had actual knowledge of the threat to his safety or that the risk of violence was so substantial or pervasive that the defendants' knowledge *could be inferred.*" (Emphasis added). Similarly, in *LaMarca,* 995 F.2d at 1536-37, the court indicated that when the evidence "paint[s] . . . a picture that would be apparent to any knowledgeable observer, . . . [a]n *inference can be*

drawn" that the defendant knew of the risk of harm. (Emphasis added).

Furthermore, in those circuits in which some cases have adopted the criminal recklessness standard, other cases have adopted a standard similar to that urged by petitioner. *See, e.g., Miltier v. Beorn*, 896 F.2d 848, 851 (4th Cir. 1990) (medical care case); *Walsh v. Brewer*, 733 F.2d 473, 476 (7th Cir. 1984) (Eighth Amendment violated where assaults are pervasive or where plaintiff belongs to identifiable group of prisoners for whom risk of assault was serious problem of substantial dimensions); *Watts v. Laurent*, 774 F.2d 168, 172 (7th Cir. 1985), *cert. denied*, 475 U.S. 1085 (1986) (should have realized strong likelihood of attack); *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir.), *cert. denied*, 484 U.S. 935 (1987) (risk of assault based on plaintiff's transsexuality sufficiently serious to require defendants to take protective measures);[55] *Greason v. Kemp*, 891 F.2d 829, 839-40 (11th Cir. 1990) (medical care case).

IV. THIS CASE SHOULD BE REMANDED TO GIVE PETITIONER AN OPPORTUNITY TO SHOW THAT, BASED ON THE RESPONDENTS' KNOWLEDGE OF HER TRANSSEXUAL STATUS, HER PLACEMENT IN GENERAL POPULATION IN A HIGH SECURITY FACILITY POSED AN OBVIOUS AND UNREASONABLE RISK

To petitioner's knowledge, no prison official in this country has ever forced a female prisoner to be confined in general population in a violent, otherwise all-male, high security facility. Petitioner believes that such a transfer would never be made, because it is so obvious that such a transfer would expose the female prisoner to such a high likelihood of harm. Indeed, in *Dothard v. Rawlinson*, 433 U.S. 321, 336-37 (1977), the Court held that being male was a bona fide occupational qualification for serving as a guard in an Alabama maximum security penitentiary precisely because of the risk of assault that would face women guards:

> There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison.
>
> * * *
>
> The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel.

Id. at 335-36.

The question therefore is whether the petitioner, whose appearance and demeanor are female, should be given an opportunity to demonstrate that it obviously exposed her to an unreasonable, indeed extraordinary, risk of sexual assault to place her in general population in a penitentiary that she alleged was known to be violent:

> A [transsexual prisoner] poses particularly serious management problems for prison officials. Given her transsexual identity and unique physical characteristics, her being housed with male inmates in a general population cell would undoubtedly create, in the words of the district court, "a volatile and explosive situation." Under such circumstances, it is unlikely that prison officials would be able to protect her from the violence, sexual assault, and harassment about which she complains.

Meriwether v. Faulkner, 821 F.2d 408, 417 (7th Cir. 1987), *cert. denied*, 484 U.S. 935 (1987) (citation omitted).

Petitioner alleged that all of the respondents knew her life would be endangered if she were transferred to Terre

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[55] In the Seventh Circuit, the earlier line of cases which adopted a standard similar to that urged by petitioner were overruled in *McGill*, 944 F.2d at 349.

Haute. With one exception,[56] the respondents denied that allegation. However, as noted in the Statement of the Case, another federal court, *relying on a declaration of respondent Edwards* in that case,[57] concluded as follows:

> Clearly, placing plaintiff, a twenty-one year old transsexual, into the general population at Lewisburg, a Level Five security institution, could pose a significant threat to internal security in general and to plaintiff in particular.

Farmer v. Carlson, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988).

Petitioner requests a remand to attempt to prove that what was clear to the federal court in *Farmer v. Carlson* prior to her assault at Terre Haute should have been "obvious" to the respondents: forcing a transsexual into general population at a high security, allegedly violent, all-male institution subjected her to an unreasonable risk of assault. Indeed, it is hard to imagine a circumstance in which the risk of sexual assault would be more obvious.

As noted in the Statement of the Case, with the arguable exceptions of respondents Edwards and Kurzydlo, none of the respondents submitted any evidence addressing whether or not they should have known of an unreasonable risk to petitioner. Respondent Edwards claimed to have no reason to believe that there was a threat to

[56] Mr. Brennan, the warden at FCI-Oxford, in his declaration filed in support of summary judgment, did not deny that he knew petitioner was likely to be assaulted at Terre Haute; he simply denied any personal involvement "other than signing the transfer order." J.A. at 13 ¶ 5. Given that the gravamen of petitioner's complaint was that the transfer exposed her to sexual assault, respondent Brennan's declaration cannot support summary judgment, even under the highly restrictive Seventh Circuit standard. For that reason, under whatever standard this Court adopts, this case must be remanded for trial regarding respondent Brennan.

[57] Edwards, the warden at USP-Lewisburg at the time, does not deny knowing that Farmer was placed in general population at Terre Haute. *See* Edwards Declaration, J.A. at 93.

petitioner in general population at USP-Terre Haute, yet he had previously claimed that there was a risk of harm to petitioner in general population at Lewisburg, another high security facility. Respondent Kurzydlo knew of petitioner's transsexual status and there was evidence in the record, including the decision in *Farmer v. Carlson*, 685 F. Supp. 1335 (M.D. Pa. 1988), suggesting that he should have known that placing her in general population at Terre Haute posed an unreasonable risk. Accordingly, there was a material dispute of fact regarding whether these two respondents should have known of the risk facing petitioner. Whether the other respondents should have known of the risk also remains to be determined by the trier of fact.

Moreover, petitioner opposed summary judgment indicating that she was attempting to obtain documents in discovery that would show that respondents knew that USP-Terre Haute was a violent institution with a history of sexual assaults, and that each respondent acted with "reckless disregard" to petitioner's safety. Discovery demonstrating that USP-Terre Haute was a violent institution with a pattern of sexual assaults could be highly relevant to showing that respondents should have known that petitioner, with specific characteristics that placed her at enormously increased risk for rape, should not have been transferred to general population at USP-Terre Haute. For these reasons, petitioner urges the Court to remand to the district court to allow discovery to proceed.[58]

[58] Even if this Court upholds the Seventh Circuit "actual knowledge" standard, this case should be remanded. The district court held, and the Seventh Circuit summarily affirmed, that petitioner could not withstand summary judgment because respondents stated in affidavits that they did not know that petitioner was at risk of harm. However, petitioner alleged, and the facts indicated, that respondents *did* know that petitioner would be in danger. *See supra* Statement of the Case at 7-8. Their statements otherwise are not dispositive. Even under a criminal recklessness standard, "a defendant will rarely admit an awareness and conscious disregard of a risk [so] the trier of fact must examine objective

CONCLUSION

For the above reasons, petitioner urges this Court to reverse the decision of the court of appeals affirming the grant of summary judgment to the respondents, and to remand to the district court for trial.

Respectfully submitted,

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criteria." *Redman v. County of San Diego*, 942 F.2d 1435, 1450 (9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 972 (1992) (Thompson, J., and Alarcon, J., dissenting) (citing Prosser and Keeton, *The Law of Torts* 213 (5th ed. 1984)). "This requires an analysis of the surrounding circumstances, which include the context in which the defendant chooses a course of action and the obviousness of the risk resulting from the defendant's conduct." *Id.* Under the circumstances of this case, all factors indicate that, at a minimum, the issue of respondents' knowledge of the risk was disputed and the district court's entry of summary judgment was therefore erroneous.

(6)

No. 92-7247

In the Supreme Court of the United States

OCTOBER TERM, 1993

DEE FARMER, PETITIONER

v.

EDWARD BRENNAN, WARDEN, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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24 pp

QUESTION PRESENTED

Whether, under the Eighth Amendment to the Constitution, petitioner is entitled to damages or an injunction against various federal prison officials responsible for transferring him to, or assigning him within, a prison facility where he was sexually assaulted by another inmate.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The judgment of the court of appeals (J.A. 127-128) and the opinion and order of the district court (J.A. 120-126) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1992. The petition for a writ of certiorari was filed on January 1, 1993,[1] and was granted on October 4, 1993. J.A. 129. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] On November 2, 1992, Justice Stevens granted petitioner's application for an extension of time within which to file a petition for certiorari until January 4, 1993.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment of the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

1. Petitioner is currently serving a twenty-year sentence in the federal prison system for credit-card fraud.[2] J.A. 24-25, 107. Petitioner is a biological male, but considers himself a "pre-operative transsexual." J.A. 43, 49-51. See also *Farmer* v. *Haas*, 990 F.2d 319, 320 (7th Cir. 1993). Because petitioner is a biological male, he has been incarcerated in all-male federal correctional facilities while serving his sentence. *Id.* at 320.[3]

During the period relevant to this case, the federal prisons were assigned a security level from one to six (level one being minimum security and level six being maximum security). J.A. 34. Prior to the time of the incident at issue in this case, petitioner was housed in various facilities within the federal Bureau of Prisons (BOP) system. J.A. 107-111. From March, 1987, to January, 1988, petitioner was incarcerated at the Federal Correctional Institution (FCI) in Petersburg, Virginia, a security level-four institution. J.A. 34, 110. While incarcerated at Petersburg,

[2] Petitioner has also been convicted and sentenced to thirty years in prison by the State of Maryland for theft and attempted theft. J.A. 25.

[3] Because petitioner is a biological male, the government uses the male pronouns "him" and "he" to refer to petitioner in its brief.

petitioner was placed in the general prison population. J.A. 110. However, he was frequently placed temporarily in "administrative detention" for committing disciplinary violations (including credit-card fraud). J.A. 24, 26, 57, 58-59.

In January, 1988, petitioner was transferred for disciplinary reasons to the FCI in Oxford, Wisconsin, another level-four institution. J.A. 26, 34, 112. Again, petitioner was housed with the general prison population. J.A. 61. While at Oxford, petitioner again committed numerous disciplinary violations. His offenses included purchasing merchandise over the telephone and credit-card fraud. J.A. 15-16, 19-29. He was also charged with having sexual relations with another inmate while knowingly carrying the Human Immunodeficiency Virus (HIV).[4] See also *Farmer* v. *Moritsugu*, 742 F. Supp. 525 (W.D. Wis. 1990).

In response to petitioner's numerous violations and charges, the FCI-Oxford officials requested that he be transferred for disciplinary reasons. In the transfer request, the warden stated that FCI-Oxford officials believed "that [petitioner] requires the security and supervision offered at a Penitentiary." J.A. 32.[5] The BOP's regional office approved the transfer request and, in March, 1989, petitioner was transferred to

[4] Petitioner was later found guilty of this charge. See *Farmer* v. *Cowan*, No. 90-1670, 1992 U.S. App. LEXIS 4918 (7th Cir. Mar. 18, 1992) (a per curiam unpublished order).

[5] Respondent Kurzydlo, an FCI-Oxford official, recommended that petitioner be placed in a level-five penitentiary. The official explained that "[petitioner] had been given two opportunities to function in a Security level '4' institution, but became a management problem due to his failure to abide by the rules at both institutions." J.A. 37.

the USP in Terre Haute, Indiana, also a level-four institution. J.A. 34, 64-65. Like all new inmates, petitioner was initially placed in administrative detention while the institution's "unit team" decided what housing placement was appropriate. J.A. 94. See also 28 C.F.R. 522.10 *et seq.* (procedures for classification of new inmates); 28 C.F.R. 522.20 *et seq.* (procedures for intake screening of new inmates). Following an assessment by Terre Haute personnel, petitioner was placed in the general prison population at Terre Haute. J.A. 94. Petitioner does not claim in this action that he ever asked to be kept in administrative detention or protective custody at Terre Haute, that he objected to being placed with the general prison population, or that he advised any Terre Haute official that he felt threatened or in danger. *Ibid.*

Petitioner alleges that on April 1, 1989, he was sexually assaulted by another inmate. J.A. 115-116. On April 7, 1989, petitioner was placed in administrative detention at the direction of the Regional BOP Office because his status as a high-risk HIV-positive inmate posed a danger to others. J.A. 94-95, 123. There is no allegation that petitioner was subjected to any additional physical assaults after his placement in administrative detention at USP-Terre Haute.

2. On August 20, 1991, petitioner filed this civil action against the Director (J. Michael Quinlan) and Regional Director (Calvin Edwards[6]) of BOP in their official capacities, and four Bureau officials in their individual and official capacities. J.A. 45-49; D. Ct. Record Item 27 (Amended Complaint), at 1-2. The four defendants sued in their official and individual

[6] Mr. Edwards was the warden at the Terre Haute Penitentiary when the alleged sexual assault occurred.

capacities were: Larry E. DuBois, who was Regional Director of the BOP North Central Region, which encompasses FCI-Oxford; N.W. Smith, a correctional services administrator in the Bureau's regional office, who was involved in the approval of the request for petitioner's transfer to USP-Terre Haute; Edward Brennan, warden at FCI-Oxford, who requested the transfer; and Dennis Kurzydlo, a case manager at FCI-Oxford. J.A. 47-49. Petitioner alleged that, despite knowing that USP-Terre Haute was a violent institution with a history of inmate assaults, and that petitioner, as a pre-operative transsexual, was particularly vulnerable to sexual attack by other inmates, the respondents participated in the decision to transfer him to that institution in violation of his rights under the Eighth Amendment to the Constitution. J.A. 65-67. He sought compensatory ($100,000) and punitive damages ($100,000) against the four individual respondents under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). J.A. 69. Petitioner also sought an injunction requiring BOP to place him in a "co-correctional facility" (i.e., one housing both sexes) and barring the Bureau from confining him in any "penitentiary." *Ibid.*

3. After the parties submitted various declarations, see J.A. 8-15, 41-102, 105-107, respondents moved for summary judgment. Petitioner filed a cross-motion for summary judgment and also filed a motion under Fed. R. Civ. P. 56(f), claiming that additional discovery was necessary to oppose respondents' summary judgment motion. J.A. 120-121. The government filed a motion for a protective order staying discovery until the court resolved the issue of qualified immunity. J.A. 121. The district court then denied petitioner's Rule 56(f) motion, holding that petitioner had not shown that the documents requested

were necessary to oppose the motion. J.A. 120-121.[7] Without ruling on qualified immunity, the court then granted summary judgment in favor of respondents on all claims. J.A. 120-126.

The district court held that prison officials "are liable under the Eighth Amendment if they had actual knowledge of a threat to an inmate's safety and failed to take action to prevent the danger." J.A. 124. The court further stated that a prisoner normally proves actual knowledge by showing that he complained to prison officials about a specific threat of harm. The court opined that an official will only be held liable if the failure to prevent an attack was "deliberate or reckless in a criminal sense." *Ibid.*

The court found that there was no evidence that the respondents had any reason to believe that the USP-Terre Haute officials could not adequately address petitioner's safety needs. Nor did any respondent have knowledge of a specific threat to petitioner's well-being at USP-Terre Haute. J.A. 123. Further, the court found that there was no evidence that petitioner had ever expressed any concern about his safety to any of the respondents. J.A. 123-124. Accordingly, the court granted summary judgment in favor of respondents.

4. Petitioner appealed to the Seventh Circuit. That court summarily affirmed, without opinion. J.A. 127-128.

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[7] In denying the discovery motion, the court also explained that the documents requested by petitioner "were not to be filed until after both [petitioner's] dispositive motion and brief in opposition to defendants' motion for summary judgment" were due to be filed. J.A. 121.

SUMMARY OF ARGUMENT

1. In *Wilson* v. *Seiter*, 111 S. Ct. 2321, 2323 (1991), this Court acknowledged that the Eighth Amendment proscription against cruel and unusual punishment protects prisoners against certain deprivations suffered during imprisonment, including inadequate "protection * * * afforded against other inmates." *Id.* at 2326-2327. When a prison official is sued regarding an inmate's attack on another inmate, however, the official cannot be held liable unless the plaintiff establishes that his claim satisfies both the "subjective" and "objective" requirements for an Eighth Amendment violation.

a. To meet the "objective" element, a plaintiff must prove that there was "sufficient harm" attributable to the actions of the government official. See *Hudson* v. *McMillian*, 112 S. Ct. 995, 999-1000 (1992). In the context of this case, a prisoner can establish a violation of his rights under the Eighth Amendment if he shows he is incarcerated under conditions creating an unreasonably high risk that he will suffer serious harm or injury at the hands of other inmates. Cf. *Helling* v. *McKinney*, 113 S. Ct. 2475, 2481-2482 (1993). In the prison context, the meaning of "unreasonably high risk" is different from the meaning of that term in society generally, as prisons can never be made entirely free of the danger that inmates may attack others. To be actionable, the risk of inmate assault must rise significantly above the level that is ordinarily prevalent in facilities housing dangerous offenders, and be "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling*, 113 S. Ct. at 2482. A prisoner can establish

that he was exposed to an unreasonable risk of harm in a variety of ways; he need not invariably demonstrate that he was specifically threatened with injury by another identified inmate.

b. A deprivation does not constitute "punishment" in the constitutional sense unless inflicted by an official acting with a sufficiently "culpable state of mind." *Wilson*, 111 S. Ct. at 2322, 2327. See also *Helling* v. *McKinney*, 113 S. Ct. at 2481-2482; *Whitley* v. *Albers*, 475 U.S. 312, 320 (1986). Therefore, to satisfy the "subjective" element of an Eighth Amendment claim, an inmate complaining of authorities' failure to protect him from harm at the hands of other inmates must prove, at a minimum, that the official from whom he seeks damages acted with "deliberate indifference" to the danger posed by the threat of inmate violence. See, *e.g.*, *Wilson*, 111 S. Ct. at 2326-2327. See also *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976); *Manarite* v. *City of Springfield*, 957 F.2d 953, 955 (1st Cir.), cert. denied, 113 S. Ct. 113 (1992). To act with "deliberate indifference" towards potential assault by other inmates, a prison official must know of the risk of harm to which an inmate is exposed, or he must actively avoid such knowledge, see, *e.g.*, *McGill* v. *Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992), and he must fail to take readily available action to prevent the harm from occurring.

2. Petitioner's suggestion that an official inflicts "cruel and unusual" punishment if the risks to which the official exposes the inmate are the type of which the official "should have known" is at odds with this Court's construction of the Eighth Amendment in *Wilson* v. *Seiter*, *supra*, in which it held that persons in authority must act with "deliberate indifference" to prisoners' safety or well-being. The term "deliberate" mandates a knowing or conscious choice by the official being sued. Cf. *City of Canton* v. *Harris*, 489 U.S. 378, 388-389 (1989). Deliberate indifference and a subjectively culpable state of mind are only demonstrated when an official is actually aware of facts showing the existence of an unreasonable risk, but consciously and deliberately chooses to ignore the risk. An official's failure to respond to a risk of which he was not aware, but only should have been aware, does not violate the Eighth Amendment.

3. The application of a "negligence" standard of liability to prison officials charged with assigning inmates within the federal prison system is inappropriate because decisions concerning prisoner placement require officials to make subjective, complex, and highly individualized judgments. Adoption of a negligence standard would expose prison officials to potential liability from innumerable claims that officials underestimated the dangers faced by certain categories of prisoners, and courts might use hindsight to review prison officials' good faith judgments concerning inmate assignments within the prison system. To make officials liable for such errors in judgment would transform the Eighth Amendment into a "font of tort law to be superimposed" upon the administration of the federal prison system. See *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986).

4. In satisfying the "subjective" component of the standard for Eighth Amendment liability, an inmate can attempt to prove a prison official's "actual knowledge" that the prisoner was at unreasonable risk of attack in a variety of ways. An inmate need not show that he notified authorities of a specific and highly credible threat or circumstance placing him at risk. He can also attempt to use circumstantial

evidence to convince the finder of fact that officials must have had knowledge of a risk because it was "obvious." Such a method is consistent with the decision in *City of Canton* v. *Harris*, 489 U.S. 378 (1989), in which the Court adopted a "deliberate indifference" standard in the context of a claim against a municipality for failure to train city police to safeguard citizens' constitutional rights. The Court in that case suggested that the existence of an obvious risk can provide strong circumstantial evidence that an official who was in a position to perceive a risk was in fact aware of it. See, *e.g.*, *id.* at 390 & n.10; see also *Wilson* v. *Seiter*, 111 S. Ct. at 2325.

5. Although a remand to consider the relevant factual issues might be appropriate in this case, see *Helling* v. *McKinney*, 113 S. Ct. at 2481-2482, respondents submit that the Court should affirm the judgment. The only respondents potentially liable for damages (those sued in their individual capacities) are alleged to be liable solely because of their participation in the decision to transfer petitioner to USP-Terre Haute, where petitioner was allegedly attacked. Petitioner nowhere alleges any reason for believing that these officials, who had no direct responsibility for administering the Terre Haute institution, would have had knowledge of conditions within that institution regarding danger to transsexual inmates sufficient to meet petitioner's burden of demonstrating their actual knowledge and deliberate indifference under the Eighth Amendment standard. Since prison officials who transfer an inmate to another institution have every reason to believe that the transferee institution will take whatever steps are necessary—including placement in administrative detention—to protect an inmate from a known danger of attack, it

is, moreover, extremely unlikely that such a factual basis would be present. As to the two respondents sued in their official capacities and thereby liable only for prospective injunctive relief, petitioner's claim would appear to be foreclosed by his assignment to administrative detention status because of his high-risk HIV-positive condition, J.A. 94-95; 123, as well as by the absence of any allegation by petitioner that administrative detention status poses any continuing threat of physical injury to him.

ARGUMENT

I. A PRISON OFFICIAL CAN BE HELD LIABLE UNDER THE EIGHTH AMENDMENT FOR FAILING TO PROTECT AN INMATE FROM ASSAULT BY OTHER INMATES ONLY IF THE OFFICIAL HAD ACTUAL KNOWLEDGE THAT THE INMATE WAS SUBJECT TO AN UNREASONABLY HIGH RISK OF ASSAULT AND REFUSED TO TAKE READILY AVAILABLE STEPS TO ALLEVIATE THAT RISK

A. The Objective And Subjective Components Of An Eighth Amendment Claim

In addressing the circumstances in which prison officials could be regarded as inflicting "cruel and unusual punishment[]" in violation of the Eighth Amendment, this Court in *Wilson* v. *Seiter*, 111 S. Ct. 2321, 2322, 2327 (1991), acknowledged that the Eighth Amendment protects against "some deprivations that were not specifically part of the sentence but were suffered during imprisonment." 111 S. Ct. at 2323. Thus, prisoners can claim violations of their rights under the Eighth Amendment from "cruel and unusual" conditions of confinement, including inadequate food, clothing, warmth, medical care, or "pro-

tection * * * * afforded against other inmates." See *id.* at 2326-2327. The lower courts have recognized that the failure of prison officials to protect prisoners against violence at the hands of other inmates can give rise to claims of a violation of Eighth Amendment rights. See, *e.g.*, *Morgan* v. *District of Columbia*, 824 F.2d 1049, 1057 (D.C. Cir. 1987) ("a prisoner has a constitutional right to be protected from the unreasonable threat of violence from his fellow inmates"); *Meriwether* v. *Faulkner*, 821 F.2d 408 (7th Cir.) (same), cert. denied, 484 U.S. 935 (1987); *Cortes-Quinones* v. *Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.) (same), cert. denied, 488 U.S. 823 (1988).

The Court in *Wilson* stated, however, that not all deprivations that prisoners suffer at the hands of prison officials constitute Eighth Amendment violations, see 111 S. Ct. at 2324. See *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986) ("[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny"). The Eighth Amendment addresses "punishment." An inmate does not suffer "punishment" in the constitutional sense unless the deprivation is inflicted by an official acting with a sufficiently "culpable state of mind." *Wilson*, 111 S. Ct. at 2323, 2327. This Court explained in *Wilson* that the "intent" requirement was "not the predilection of this Court," but was imposed by the Eighth Amendment, "which bans only cruel and unusual *punishment*." 111 S. Ct. at 2325. Thus, in the prison context, where pain or injury inflicted upon an inmate "is not formally meted out *as punishment* by statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify [as punishment under the Eighth Amendment]." 111 S. Ct. at 2325.

Accordingly, the *Wilson* Court recognized that a valid claim for deprivation of rights guaranteed under the Eighth Amendment contains *both* a "subjective" and an "objective" component. When a prison official is sued regarding an inmate's attack on another inmate, the official therefore cannot be held liable unless the plaintiff establishes that his claim satisfies both the subjective and objective requirements for an Eighth Amendment violation. To meet the "objective" element, a plaintiff must prove that there was "sufficient harm" attributable to the actions of the government official. See *Hudson* v. *McMillian*, 112 S. Ct. 995, 999-1000 (1992). To satisfy the "subjective" element, the plaintiff must demonstrate that the responsible official acted with a "culpable state of mind." *Wilson*, 111 S. Ct. at 2322, 2327. See also *Helling* v. *McKinney*, 113 S. Ct. 2475, 2481-2482 (1993); *Whitley*, 475 U.S. at 320.

B. The Failure Of Prison Officials To Protect A Prisoner From Inmate Assaults Does Not Violate The Eighth Amendment Unless The Prisoner Has Been Exposed To An Unreasonable Risk Of Attack By Other Inmates

In *Helling* v. *McKinney*, 113 S. Ct. at 2481, the Court held that a prisoner could establish the objective element of an Eighth Amendment claim by proving that his exposure to passive cigarette smoke in prison created "an unreasonable risk of serious damage to his future health." The principle articulated in *Helling*, if translated into the context of this case, suggests that a prisoner can establish a violation of his rights under the Eighth Amendment if he shows that he is incarcerated under conditions creating an unreasonably high risk that he will suffer serious harm

or injury at the hands of other inmates. In the prison context, however, the meaning of "unreasonably high risk" is different from the meaning of that term in society generally. Prisons are inherently dangerous places. See *Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984). Within the volatile prison community, prison officials are required to protect the prison staff, visitors, and the inmates themselves. *Id.* at 526-527. In determining whether a prison risk is unreasonably high, it must be compared to the level of risk ordinarily acceptable in that type of penal institution.

Moreover, the threat of assault by another inmate is not like the risk of a static prison condition. Compare *Helling* v. *McKinney*, *supra* (addressing the risk posed by second-hand or "passive" smoke). Inmate violence is often random and unpredictable, and may depend on the temporary presence of particularly violent individuals. Such violence can never be fully controlled, despite prison officials' best efforts. See *e.g.*, *Bruscino* v. *Carlson*, 854 F.2d 162 (7th Cir. 1988) (detailing inmate violence at USP-Marion), cert. denied, 491 U.S. 907 (1989). Because day-to-day life in prisons housing violent offenders exposes inmates to a possibility of violence that may be present despite reasonable measures on the part of prison officials to ensure security, the risk of inmate assaults that is inevitably present in such facilities is not sufficient to satisfy the objective component of the Eighth Amendment. Rather, to be actionable, the risk of inmate assaults must rise significantly above the level that is ordinarily prevalent in facilities housing dangerous offenders. The level of risk to which the complaining inmate is exposed must also "be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk."

Helling, 113 S. Ct. at 2482. Such a risk of violence is not ordinarily shown by pointing to isolated incidents; it may be established by showing that assaults can be expected to occur with sufficient frequency to put the prisoner in pervasive fear for his safety. To demonstrate an unreasonable risk of serious injury, the prisoner need not invariably demonstrate that he was specifically threatened with injury by another identified inmate—although such a threat, if credible, would tend to prove that the prisoner suffered exposure to an unreasonable risk of attack. A prisoner can also establish that he was exposed to an unreasonable risk of harm, for example, by showing that he belongs to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates. See *Martin* v. *White*, 742 F.2d 469, 474 (8th Cir. 1984); *Withers* v. *Levine*, 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980).

C. The Failure Of Prison Officials To Protect A Prisoner From Inmate Assaults Does Not Violate The Eighth Amendment Unless The Officials Act With Deliberate Indifference To An Unreasonable Risk Of Attack By Other Inmates

1. Even if an inmate demonstrates the existence of an "objectively" unreasonable threat or risk of serious injury through assault by other inmates, he still must satisfy the *subjective* component of the Eighth Amendment, which "mandate[s]" an "inquiry into a prison official's state of mind." *Wilson*, 111 S. Ct. at 2324. In the context of a civil suit against a prison official based on dangerous prison conditions, the Court in *Wilson* held that the minimum requisite "culpable mental state" with which the official acts is "deliberate indifference" to the condition to which

the complaining prisoner is exposed. See *Wilson*, 111 S. Ct. at 2326-2327. See also *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976); *Manarite* v. *City of Springfield*, 957 F.2d 953, 955 (1st Cir.), cert. denied, 113 S. Ct. 113 (1992). Likewise, where the condition of which a prisoner complains is the failure to protect him from harm at the hands of other inmates, the inmate must prove, at a minimum, that the official from whom he seeks damages acted with "deliberate indifference" to the danger posed by the threat of inmate violence.[8]

Although deliberate indifference "does not require a finding of express intent to harm," *Berry* v. *City of Muskogee*, 900 F.2d 1489, 1495 (10th Cir. 1990), it does involve "more than ordinary lack of due care for the prisoner's interests or safety." *Whitley*, 475 U.S. at 319. To act with "deliberate indifference" towards potential assault by other inmates, the prison official must know of the risk of harm to which an inmate is exposed, or he must actively avoid such knowledge, see, *e.g.*, *McGill* v. *Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992), and he must fail to take readily available action to prevent the harm from occurring. Only then does the official possess the subjectively "callous" and "wanton" state of mind necessary to inflict "punishment." See *Wilson*, 111 S. Ct. at 2326; see also *Duckworth* v. *Franzen*, 780 F.2d 645, 653 (7th Cir. 1985) ("[p]unishment implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can

[8] There would, of course, also be liability if the official acted or refused to act with the intention that an inmate suffer serious harm at the hands of another inmate or inmates.

be inferred from the defendant's failure to prevent it"), cert. denied, 479 U.S. 816 (1986).

In sum, to prove "deliberate indifference" in the context of a prisoner's claim of official failure to protect him from prison violence, a plaintiff must demonstrate that:

> (1) the defendant-official knew of an unreasonably high risk of serious physical harm to an inmate from other prisoners;
>
> (2) the defendant-official had the ability to act or refrain from acting so as to significantly decrease the unreasonable risk; and
>
> (3) the defendant nonetheless did not use readily available means to protect the inmate or avoid the danger.

See also *Manarite*, 957 F.2d at 956; *McGill*, 944 F.2d at 347-351; *DesRosiers* v. *Moran*, 949 F.2d 15, 19 (1st Cir. 1991); *Doe* v. *Sullivan Co.*, 956 F.2d 545, 555 (6th Cir.), cert. denied, 113 S. Ct. 187 (1992).

2. Petitioner (Pet. Br. 15-27) contends that it is unnecessary for a prison official being sued under the Eighth Amendment to possess "actual knowledge" of an unreasonable danger to an inmate; rather, it is sufficient if the risks to which the inmate was exposed were the type of which the official "should have known." See, *e.g.*, *Young* v. *Quinlan*, 960 F.2d 351 (3d Cir. 1992). Instead of inquiring whether the official acted recklessly in disregarding a serious risk of which he had actual knowledge, petitioner would only ask whether the danger is one of which a reasonable prison official ordinarily would have been aware. Accordingly, petitioner asks this Court to adopt an "objective," "reasonable person" test for Eighth

Amendment liability in these cases. See Pet. Br. 16-17, 20-21, 26-27.

Petitioner's approach is directly at odds with this Court's construction of the Eighth Amendment in *Wilson* v. *Seiter*, *supra*. Petitioner argues in effect that purely *objective* conditions—such as a high probability that certain inmates will be exposed to attack in a particular institution—could be enough to trigger Eighth Amendment liability by the responsible official, regardless of whether the official was actually aware of the risk. In *Wilson*, the petitioner and his amici similarly argued that an Eighth Amendment violation should not invariably turn upon the knowledge possessed by the responsible official if the objective prison conditions were themselves inhumane, or otherwise cruel and unusual. See, *e.g.*, Brief for the United States at 14-21 in *Wilson*. In response, this Court squarely rejected this purely "objective" approach to an Eighth Amendment violation. *Wilson*, 111 S. Ct. 2325-2328. This Court held instead that even if conditions are objectively inhumane or cruel, a plaintiff must still establish the official's "knowledge" of the conditions to which the prisoner is exposed. *Id.* at 2325. Thus, the inquiry into the official's mental state is a "subjective" test, not, as petitioner suggests, an objective inquiry. The focus of the "subjective component" of the Eighth Amendment is on the defendant-official's actual knowledge, not on what an objectively reasonable official should have known.

Petitioner's "should have known" approach ignores the "deliberateness" requirement of the "deliberate indifference" standard. The term "deliberate" mandates a knowing or conscious choice by the official being sued. Cf. *City of Canton* v. *Harris*, 489 U.S.

378, 388-389 (1989). Deliberate indifference and a subjectively culpable state of mind are only demonstrated when an official is actually aware of facts showing the existence of an unreasonable risk, but consciously and deliberately chooses to ignore the risk. See, *e.g.*, *Duckworth* v. *Franzen*, 780 F.2d at 653. If an official is in fact unaware of facts showing an unreasonable danger or threat to an inmate, then he cannot be held to have made a conscious or deliberate choice to ignore the danger or threat. An official's failure to respond to a risk of which he was not aware [9] cannot violate the Eighth Amendment.

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[9] Some lower courts have recognized that "willful blindness" may be treated as a species of knowledge satisfying the *Wilson* "deliberate indifference" standard. See *McGill*, 944 F.2d at 351 ("Going out of your way to avoid acquiring unwelcome knowledge is a species of intent. Being an ostrich involves a level of knowledge sufficient for conviction of crimes requiring specific intent."); *Manarite* v. *City of Springfield*, 957 F.2d at 956. The "willful blindness" principle is reflected in the definition of "knowledge" in the Model Penal Code:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

Model Penal Code § 2.02. This Court relied on that definition, for example, in *Turner* v. *United States*, 396 U.S. 398, 416 & n.29 (1970), to hold that the defendant in that case "knew" that the heroin he possessed came from a foreign country, even if he lacked "specific knowledge" of its source and trajectory, because "he was aware of the 'high probability' " that the heroin came from abroad. See also *Leary* v. *United States*, 395 U.S. 6, 46 n.93 (1969); see generally Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191 (1990). In the context of prison assaults, an official might be charged with "knowledge" of an unreasonable danger, even if he does

3. The application of a "negligence" standard of liability to prison officials charged with assigning inmates within the federal prison system is especially inappropriate, because decisions concerning prisoner placement require officials to make subjective, complex, and highly individualized judgments. In determining where an inmate is to be confined, officials must exercise professional judgment to balance the peculiar needs of the prisoner, the available resources for housing prisoners, and the interest in security of other inmates and the prison system as a whole.[10] Inmates are often transferred to stricter facilities to ensure adherence to prison disciplinary rules or to remove an inmate from surroundings that he has learned to manipulate. This Court has therefore recognized that, in making subjective judgments regarding discipline and security, prison officials must be granted a "wide-ranging deference."[11] See *Bell* v.

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not possess specific information concerning the risk at issue, if he deliberately avoids acquiring such knowledge or harbors a high degree of suspicion that the risk exists.

[10] BOP regulations provide that all BOP staff "screen newly arrived inmates to ensure that Bureau health, safety, and security standards are met." 28 C.F.R. 522.20. Following an assessment of the inmate's physical and mental "health status and history," 28 C.F.R. 524.11, 524.12, BOP personnel must determine whether "there are nonmedical reasons for housing the inmate away from the general population." 28 C.F.R. 522.21. BOP staff are authorized to classify as "protection cases," and to place in administrative detention, any inmate who the staff has "good reason to believe * * * is in serious danger of bodily harm." 28 C.F.R. 541.23(a)(8) and (b).

[11] Although placement in administrative detention (rather than the general population) is one way of safeguarding prisoners from attack by other inmates, petitioner has, in fact,

Wolfish, 441 U.S. 520, 547 (1979); see also *Hewitt* v. *Helms*, 459 U.S. 460, 474 (1983); *Whitley*, 475 U.S. at 321-322. As long as a security measure is taken in good faith and for a legitimate purpose, "neither judge nor jury" may "freely substitute their judgment for that of officials who have made a considered choice." *Whitley*, 475 U.S. at 322.

If the standard for Eighth Amendment liability is whether an official responsible for prisoner assignments "should have known" of an unreasonable danger of attack, then courts might use hindsight to review prison officials' good-faith judgments concerning the placement of individual prisoners. Within federal prison facilities, there are many categories of inmates who might be subject to a heightened risk of attack by others. A male inmate who is small or effeminate, known as an informant, a member of a gang, convicted of an unpopular offense (such as child molestation), outnumbered by members of another race, or who has been attacked in the past, could claim that prison officials committed an error in judgment by underestimating the danger that he faced. See *e.g.*, *McGill*, 944 F.2d at 350. To make officials liable for such errors in judgment would

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challenged his assignment to administrative detention in the past. When petitioner was incarcerated at USP-Lewisburg, a level-five institution, he spent all of his time there in administrative detention because of the concern that his presence in the general population at that prison would create a threat to internal security. See *Farmer* v. *Carlson*, 685 F. Supp. 1335 (M.D. Pa. 1988). Petitioner sued various BOP officials, arguing that his confinement to administrative detention at USP-Lewisburg violated the Eighth Amendment and deprived him of his right to due process of law. *Id.* at 1341-1344.

transform the Eighth Amendment into a "font of tort law to be superimposed" upon the administration of the federal prison system. See *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986).

4. Petitioner's principal objection to an actual knowledge standard is that it will permit a prison official to escape liability even when a threat or unreasonable risk of assault is "obvious." Pet. Br. 26-27. However, a subjective actual knowledge standard does *not* preclude a plaintiff from attempting to convince the finder of fact that officials must have had knowledge of a risk because it was obvious. Actual knowledge can be proven in a variety of ways. Typically, an inmate will demonstrate knowledge of danger by showing that the inmate notified the official of a specific and highly credible threat or circumstance placing him at risk. See *McGill*, 944 F.2d at 349; *James* v. *Milwaukee County*, 956 F.2d 696, 700 (7th Cir.), cert. denied, 113 S. Ct. 63 (1992). A plaintiff may also attempt to prove through other types of circumstantial evidence that the defendant-official had actual knowledge of the risk or threat at issue. See *James* v. *Milwaukee County*, 956 F.2d 696, 700 (7th Cir. 1992) (citing cases). For example, if there is evidence that an unreasonable risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus "must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk. See *Swofford* v. *Mandrell*, 969 F.2d 547, 550-551 (7th Cir. 1992); *James*, 956 F.2d

at 700. See also *Wilson*, 111 S. Ct. at 2325 ("[t]he long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent"). Although the "must have known" and the "should have known" tests for liability, if applied to "obvious" risks, will often lead to the same result, they are nevertheless distinct. Thus, even if the risk that a certain inmate would be assaulted was "obvious"—in that, for example, similar attacks were extremely commonplace—and even if a prison official was in a position to know of the risk, a finding by the trier of fact that the official actually did not know of the risk (*e.g.*, because he was under a mistaken impression that the risk was slight) would bar Eighth Amendment liability.

5. In *City of Canton* v. *Harris*, 489 U.S. 378 (1989), this Court considered the question of when a municipality could be held liable under 42 U.S.C. 1983 for inadequate training of police to safeguard citizens' constitutional rights. The Court explained that a municipality could be found to be "deliberately indifferent" to the need for training where the failure to provide such training was "so likely" to result in a violation of constitutional rights that the need for such training was "obvious." *Canton*, 489 U.S. at 390. From this statement in *Canton*, petitioner deduces that, in an Eighth Amendment case, if the risk of injury or the threat to an inmate is "obvious," there is no need to inquire into whether the defendant-official was actually aware of it. See Pet. Br. 15-26. Rather, officials can be charged with "constructive knowledge" that "placing a prisoner in that circumstance would lead to an unreasonable risk of assault." *Id.* at 17.

The *Canton* majority's discussion of "obvious" risks, see 489 U.S. at 390 & n.10, is not inconsistent

with the actual knowledge standard outlined above. As previously discussed, the existence of an obvious risk can provide strong circumstantial evidence that an official who was in a position to perceive the risk was in fact aware of it. Similarly, the Court's discussion in *Canton* of the circumstances making the need to train "obvious" is compatible with a standard of "deliberate indifference" that permits knowledge to be inferred from appropriate circumstances, rather than a standard that permits liability to be imposed on the basis of a conclusion that the actor "should have known" of the risk, whether or not actual knowledge could ultimately be established.[12]

The Court's analysis in *Canton* is not, in any event, wholly applicable to the situation before the Court here. In *Canton*, there was little question that the responsible municipal officials were aware of certain *facts* concerning the tasks that city police officers would be called upon to perform in the course of their duties. See 489 U.S. at 390 n.10 (stating that "city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part

[12] That the Court's discussion of "obviousness" in *Canton* is best read as suggesting a method for inferring subjective knowledge, rather than as adopting an objective standard of "constructive knowledge," is buttressed by the Court's citation to *Canton* in *Wilson* v. *Seiter*. The *Wilson* Court relies on the decision in *Canton* for the proposition that circumstances going to the "obviousness" of a risk—such as "[t]he long duration of a cruel prison condition"—may make it easier to prove knowledge on the part of prison officials, see 111 S. Ct. at 2325. The *Wilson* Court does not suggest that the Court in *Canton* would have held the municipality liable even absent any awareness by city officials of the conditions giving rise to the need to train police to safeguard constitutional rights.

to allow them to accomplish this task."). The only question in *Canton* was whether knowledge of these facts made the need to train police in the use of deadly force so "obvious," as a matter of judgment, that the city could be held liable for failing to do so. See 489 U.S. at 390 n.10 ("[T]he need to train officers in the constitutional limitations on the use of deadly force * * * can be said to be 'so obvious' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights."). The question in this case, in contrast, is not whether the need to take action should be considered "obvious" because of "facts"—*i.e.*, the presence of a risk to certain inmates—of which officials are acknowledged to be aware. Rather, the question here is whether the prison officials are aware of the facts establishing the risk in the first place.

II. THE JUDGMENT BELOW SHOULD BE AFFIRMED

Petitioner alleges that respondents in this case violated his Eighth Amendment rights by transferring him to an institution in which he was in serious danger of violent sexual assault. In order to recover under the correct constitutional standard, discussed in Part I of this brief, petitioner would be required to show, at the very least, that respondents acted to effectuate his transfer with actual knowledge that petitioner would, in fact, be subject to a substantially increased and unreasonably high risk of violent sexual attack at the new institution, and that respondents effectuated the transfer with deliberate indifference to that risk.

Petitioner made general allegations to this effect in his *pro se* complaint. Paragraph 1 of that com-

plaint first alleges that respondents violated his rights, "due to their deliberate indifference to her saftey [*sic*] arising from their inappropiate [*sic*] classification, designation and housing of her, as a transsexual, in a penitentiary that has a violent environment, knowing such would endanger her life and did indeed result in her being harass,[*sic*] threaten [*sic*] and sexually assualted [*sic*]." J.A. 43-44. With regard to petitioner's transfer to USP-Terre Haute, which is the immediate subject of this litigation, petitioner alleged that respondents "were aware that USP-Terre Haute is a penitentiary, with a violent environment, housing a majority of violent offenders with frequent incidents of assualts [*sic*], * * * [as] well as a history of murders, weapons, drugs, sexual assualts [*sic*], etc." and that "to place the plaintiff or any male-to-female peroperative [*sic*] transsexual, who has a feminine appearance, presents themselves mentally and physically as female, has been administered female hormones and had begun to prepare for Sex Reassignment Surgery would be sexually assualted [*sic*] at USP-Terre Haute, and through their actions or omissions permitted the plaintiff to be designated and housed at USP-Terre Haute." J.A. 65-66. In their declaration supporting their motion for dismissal, respondents either denied personal knowledge that petitioner would be subjected to an increased danger as a result of his transfer, denied responsibility for the transfer, or both. See J.A. 8-18, 93-102.

Respondents subsequently filed a motion for summary judgment. At the time this motion was acted upon by the district court petitioner had a pending second discovery request for production of documents.

In response to respondents' summary judgment motion petitioner moved, pursuant to Fed. R. Civ. P. 56(f), that the district court not act on the summary judgment motion because of his pending discovery request. In this Rule 56(f) motion, petitioner alleged that he was unable to respond to the summary judgment motion "because the materials necessary for the plaintiff's response is [*sic*] in the possession of the defendants." J.A. 103. In an affidavit attached to his response, petitioner alleged that the documents he had requested through the pending discovery request "are expected to show that each defendant had knowledge that USP-Terre Haute was and is, a violent institution with a history of sexual assault, stabbings, etc. The evidence is further expected to show that each defendant showed reckless disregard for my safety by designating me to said institution knowing that I would be sexually assaulted." J.A. 105-106.

The district court denied petitioner's motion under Rule 56(f) and simultaneously granted respondents' motion for summary judgment. As to the Rule 56(f) motion, the court held that the documents sought by petitioner were "not shown by plaintiff to be necessary to oppose defendants' motion for summary judgment." J.A. 121.

Respondents submit that the Court should affirm these district court determinations. The only respondents potentially liable for damages in this case (those sued in their individual capacities) are alleged to be liable solely because of their participation in the decision to transfer petitioner *to* USP-Terre Haute, where petitioner was allegedly attacked. Petitioner nowhere alleges any reason for believing that these

officials, who had no direct responsibility for administering the Terre Haute institution, would have had knowledge of conditions within that institution regarding danger to transsexual inmates sufficient to meet petitioner's burden of demonstrating their actual knowledge and deliberate indifference under the Eighth Amendment standard. Although petitioner's affidavit, submitted in support of his Rule 56(f) motion, alleged that the documents he had requested through discovery "are expected to show" information bearing on such knowledge by each respondent, the affidavit does not offer any factual basis for that conclusion. Since prison officials who transfer an inmate to another institution have every reason to believe that the transferee institution will take whatever steps are necessary—including placement in administrative detention—to protect an inmate from a known danger of attack, it is, moreover, extremely unlikely that such a factual basis would be present. As to the two respondents sued in their official capacities, and therefore liable only for prospective injunctive relief, petitioner's claim would appear to be foreclosed by his assignment to administrative detention status because of his high-risk HIV-positive condition, J.A. 94-95, 123,[13] as well as by the absence of any allegation by petitioner that administrative

[13] Under BOP regulations, an inmate may be placed in "controlled housing status" when there is "reliable evidence causing staff to believe that the inmate engages in conduct posing a health risk to others." 28 C.F.R. 541.61; see also 28 C.F.R. 541.62 *et seq.* (procedures for referring HIV positive inmates to controlled housing status). Petitioner's placement in administrative segregation, beginning in April, 1989, was based on his having had sexual relations with another inmate while knowingly carrying the HIV virus. See pages 3-4, *supra*.

detention status poses any continuing threat of physical injury to him.

The issues concerning the correctness of the district court's decisions on respondents' summary judgment motion and petitioner's Rule 56(f) response to that motion are specific and unusual factual ones involving the exercise of trial court discretion. The Court may therefore believe that they are most appropriately dealt with on remand, where the lower courts will have the full benefit of this Court's opinion in this case regarding the constitutional standard to be applied here. See, *e.g.*, *Helling* v. *McKinney*, 113 S. Ct. at 2481-2482. Respondents submit, however, that the record developed in the district court calls for affirmance of the decision of the court of appeals.

CONCLUSION

The judgment of the court of appeals summarily affirming the district court's grant of respondents' motion for summary judgment should be affirmed.

Respectfully submitted.

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No. 92-7217

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DEE FARMER,
Petitioner,
v.
EDWARD BRENNAN, WARDEN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. THE LACK OF DISAGREEMENT BETWEEN THE PARTIES ON SEVERAL ISSUES CONSIDERABLY NARROWS THE ISSUE PRESENTED IN THIS CASE

The respondents' brief makes several implicit and explicit concessions that substantially narrow the issue presented in this case:

(1) The most important concession, which respondents acknowledge may require remand in this case (Respondents' Brief at 10, 29), is that the Seventh Circuit applied an unduly restrictive standard of "deliberate indifference." The Seventh Circuit criminal recklessness standard provides that "punishment implies at a minimum *actual knowledge of impeding harm easily preventable*, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it." *Duckworth v. Franzen*, 780 F.2d 645, 653 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (emphasis added) [hereinafter *Franzen*]. The respondents retreat from essentially every aspect of this standard. First, although respondents ask the Court to adopt the Seventh Circuit's requirement that a plaintiff prove that a defendant had actual knowledge of an unreasonable risk, respondents concede that the standard may be satisfied by circumstantial evidence, a form of proof the Seventh Circuit has not recognized.[1] Second, respondents dispense with the requirement that the harm be "impending."[2] Finally, respondents substitute "readily preventable" for "easily preventable."[3]

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[1] *See* discussion *infra* at points 3 and 5.

[2] This concession is compelled by this Court's decision in *Helling v. McKinney*, 113 S.Ct. 2475, 2480 (1993).

[3] For the reasons given in petitioner's opening brief, neither formulation is correct. (*See* Petitioner's Brief at 35 & n.53.) In *Helling*, 113 S.Ct. at 2480, this Court stated that a prisoner "could successfully complain about demonstrably unsafe drinking

Indeed, neither respondents nor their amici respond to petitioner's argument that the Seventh Circuit standard is so unduly restrictive that it is essentially indistinguishable from the "malicious and sadistic" standard [4] that this Court has contrasted to the deliberate indifference standard. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); *Wilson v. Seiter*, 111 S.Ct. 2321, 2326-27 (1991).[5]

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water without waiting for an attack of dysentery." Even if it were cumbersome and expensive for a prison to correct such a problem, it would nevertheless be required to do so.

[4] The Seventh Circuit has implicitly equated its deliberate indifference standard with a malice standard. *See Duckworth v. Franzen*, 780 F.2d 645, 654 (7th Cir. 1985) (defendant's conduct not deliberately indifferent when not "willful and malicious"). The harshness of the Seventh Circuit standard, as well as its congruence with the *Whitley* malice standard, was illustrated in a recent Seventh Circuit case:

> The subjective component of unconstitutional "punishment" is the *intent* with which the acts or practices constituting the alleged punishment are inflicted. The minimum intent required is "*actual* knowledge of *impending* harm *easily* preventable." A failure of prison officials to act in such circumstances suggests that the officials *actually want the prisoner to suffer the harm.*

Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992) (last emphasis added) (citation omitted).

[5] Respondents' presentation of the criminal recklessness standard is rife with inconsistencies. They cite with apparent approval the language from *Franzen* quoted above in the text and rely on other Seventh Circuit cases to the same effect. However, as discussed in the text, their own characterization of the standard considerably softens the Seventh Circuit formulation without acknowledging the differences. Similarly, they obscure the harshness of the Seventh Circuit criminal law standard by citing cases adopting that standard and cases rejecting it more or less interchangeably. For example, *Berry v. City of Muskogee, Okla.*, 900 F.2d 1489, 1495 (10th Cir. 1990), cited by respondents in the same paragraph on page 16 of their brief as *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992), and *Franzen*, "reject[s *Franzen*'s] conclusion that anything less than criminal recklessness by a jailer is per se insufficient to give rise to Eighth Amendment protection." (Footnote omitted).

(2) Closely related to respondents' concession regarding the harshness of the Seventh Circuit standard is their agreement that "deliberate indifference" in the Eighth Amendment context is consistent with the meaning of that term adopted in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) [hereinafter *Canton*]. (Petitioner's Brief *passim*; Respondents' Brief at 10, 23-24 (arguing that the standard they urge is consistent with *Canton*)).

(3) A consequence of respondents' concession regarding the applicability of *Canton* is their acknowledgement that a plaintiff may establish deliberate indifference by proving that officials "must have had knowledge of a risk because it was 'obvious.'" (Respondents' Brief at 9-10.) A logical extension of this position is that once a plaintiff produces sufficient evidence that a risk was obvious, the case, as a matter of law, will withstand summary judgment and *must* go to the trier of fact. In contrast, under the Seventh Circuit standard that the respondents no longer defend, proof of an obvious risk that the defendant should have known about will not, by itself, even allow the plaintiff to present the case to the jury. *See infra* note 6.

(4) Another consequence of respondents' concession regarding the applicability of *Canton* is their acknowledgement that deliberate indifference may exist where a *class* of prisoners, as well as where a specific person, is subject to an unreasonable risk. (Respondents' Brief at 15.)

(5) Finally, contrary to the Seventh Circuit's position in *McGill* v. *Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992) [hereinafter *McGill*],[6] respondents acknowledge that "deliberate in-

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[6] In *McGill*, the court of appeals considered a jury instruction stating that officials were deliberately indifferent if they should

difference" does not necessarily require that a prisoner prove that he or she told prison officials of the threat of harm. (Respondents' Brief at 4.)

The respondents' concessions leave only the following disagreement[7] for this Court: Under the respondents' proposed standard, a plaintiff who has proven that the existence of an unreasonable risk was obvious has demonstrated sufficient circumstantial evidence of defendants' actual knowledge to escape summary judgment. This is a significant improvement over the test utilized by the court below. However, under respondents' proposal, the trier of fact still must determine that the defendant had actual knowledge of the risk in order for plaintiff to prevail. The requirement of proving actual knowledge is where the parties diverge. Petitioner's position is that the deliberate indifference standard set forth in *Canton* is met once the

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have known of the risk. The jury reached a verdict for the prisoner. On appeal, the court of appeals not only reversed the jury verdict, but held that as a matter of law the evidence would not support a judgment for plaintiff. *McGill*, 944 F.2d at 349. Indeed, the court stated that prisoner assault cases should be dismissed at the pleading stage if the prisoner has not alleged that he or she told officials about the threat. *Id.* Neither *McGill* nor *Franzen* suggests that the existence of an obvious risk can be offered as circumstantial evidence of actual knowledge.

[7] The other issues on which the parties agree are the following:

(1) "Willful blindness" is a species of actual knowledge that satisfies the "deliberate indifference" standard. (Respondents' Brief at 16, 19 n.9.)

(2) Liability cannot be established where there is an unreasonable risk of harm present in a facility but the risk is neither known nor obvious to prison officials. Such a circumstance would exist, for example, where the population is in a constant state of terror but the intimidation of victims is so effective that they do not complain and nothing else alerts officials to the situation.

(3) The objective aspect of a prisoner-on-prisoner assault case is governed by *Helling v. McKinney*. (Respondents' Brief at 7-8, 13-14.)

plaintiff has proven that the defendants knew facts which rendered an unreasonable risk obvious; under such circumstances, the defendant should have known of the risk and will be charged with such knowledge as a matter of law.

Despite the significant narrowing of the parties' differences, the Court's ruling on this remaining issue is of critical importance. As noted, under petitioner's standard, knowledge will be imputed where a plaintiff has proven that the existence of an unreasonable risk was obvious. Evidence of obviousness is readily available to both sides. Under the respondents' proposed standard, however, plaintiff's proof that the existence of an unreasonable risk was obvious is only circumstantial evidence of actual knowledge. Confronted with that circumstantial evidence, defendants will frequently present direct, albeit self-serving, testimony denying actual knowledge of the risk. This unequal access to direct evidence will often result in triers of fact failing to find deliberate indifference even when the defendants had actual knowledge of the risk.

II. THE DELIBERATE INDIFFERENCE STANDARD ENUNCIATED IN *CANTON* AND *WILSON* DOES NOT REQUIRE PRISONERS TO INFORM OFFICIALS OF OBVIOUS RISKS

Wilson v. Seiter, 111 S.Ct. 2321 (1991), held that the subjective component of an Eighth Amendment violation in the context of prisoner-on-prisoner assaults is met by a showing of "deliberate indifference," a term previously defined in *Canton*, 489 U.S. 378. While respondents seem to concede the applicability of *Canton*, their interpretation of the case eviscerates the Court's holding that disregard of obvious risks amounts to deliberate indifference. The respondents' reading of *Canton* substitutes the word "known" for the word "obvious." When this Court in *Canton* used the term "obvious" to define deliberate indifference, it meant it. Respondents' reading of *Canton* would mean that, although *Canton* never used

the words "actual knowledge," it was *sub silentio* imposing an "actual knowledge" requirement on plaintiffs. Because the nature and level of a plaintiff's proof was the central issue in the case, this reading of *Canton* must be wrong.

Justice O'Connor's concurring and dissenting opinion is also flatly inconsistent with respondents' argument. That opinion stated that the deliberate indifference standard is met "[w]here a § 1983 plaintiff can establish that the facts available to city policymakers put them on *actual or constructive notice* that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens. . . ." *Canton*, 489 U.S. at 396 (emphasis added). Black's Law Dictionary defines "constructive notice" as follows: "Such notice as is implied or imputed by law. . . . Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing." Black's Law Dictionary 165 (5th ed. 1983). Thus, when the plaintiff has proven an "obvious" or "notorious" risk, actual knowledge of the risk is imputed to the defendant by operation of law. Accordingly, contrary to respondents' position, once an obvious risk is established, the trier of fact must find actual knowledge.

Indeed, the specific hypothetical used in *Canton* to illustrate the deliberate indifference standard, the need to train officers in the use of deadly force, did not involve actual knowledge of the risk of harm. 489 U.S. at 390 n.10. The Court's example assumed that city policymakers knew the following two facts: (1) police officers will need to use force to arrest fleeing felons, and (2) police officers have been equipped with guns. After these facts were shown, the plaintiff was not required to prove that city policymakers had actual knowledge of the risk that untrained police officers would shoot people without justification because the underlying facts, which were known to city policymakers, rendered that risk "obvious." *Id.*

Similarly, in this case, petitioner will be able to show that prison officials knew that (1) she was a transsexual; (2) the penitentiary in which she was to be housed was a maximum security facility with frequent sexual assaults; and (3) transsexuals "present a unique management problem in a correctional setting." (Respondents' Answer, J.A. 71, 74 ¶ 28.) Indeed, petitioner alleged that all respondents were aware of *Farmer v. Carlson*, 685 F. Supp. 1335 (M.D. Pa. 1988), in which the federal court relied on a declaration by one of the respondents to find that placing her in general population at a maximum security facility would pose a threat to her. (*See* Complaint J.A. 57-58, ¶¶ 51, 55.) As in *Canton*, these underlying facts, when shown to be known to prison officials, at a minimum raise a factual controversy as to whether it created an obvious and unreasonable risk to place petitioner in general population at USP-Terre Haute.[8]

The parallel between *Canton* and this case occurs when a prison official or a policymaker knows facts that render obvious an unreasonable risk of harm, and does not take action in response to that risk. In these circumstances, because the officials know the underlying facts, knowledge of the risk is imputed to them and it is immaterial whether they actually recognized it. In either case, deliberate indifference has been established, and thus the subjective component of the Eighth Amendment has been satisfied.[9]

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[8] Although respondents argue that the standard they urge is consistent with *Canton*, they also argue that the *Canton* analysis is not "wholly applicable" to this case because, in *Canton*, the underlying facts which gave rise to the risk of harm were known to the defendants, whereas, in this case, "the prison officials [we]re unaware of the facts establishing the risk in the first place." (Respondents' Brief at 10, 23-25.) As discussed in the text, this is plainly wrong.

[9] Deliberate indifference, as defined in *Canton*, is the least culpable state of mind that the law places within the general category of "intentional" states. (*See* Petitioner's Brief at 20-21.) Indeed *Canton* and *Wilson* both adopted the deliberate indifference standard precisely because it is the least culpable state of mind con-

This standard is fully consistent with *Canton* and *Wilson*. As the Third Circuit explained in *Young v. Quinlan*, 960 F.2d 351 (3d Cir. 1992):

> "should have known[]" [d]oes not refer to a failure to note a risk that would be perceived with the use of ordinary prudence. It connotes something more than a negligent failure to appreciate the risk . . . , though something less than subjective appreciation of that risk. The strong likelihood of [harm] must be so obvious that a lay person would easily recognize the necessity for preventative action; the risk of . . . injury must be not only great, but also sufficiently apparent that a lay custodian's failure to appreciate it evidences an absence of any concern for the welfare of his or her charges.

Young v. Quinlan, 960 F.2d at 361 (internal quotation marks and citation omitted).[10]

Whether petitioner's placement in general population at USP-Terre Haute created an obvious risk is a factual question requiring development upon remand. If it is found that respondents knew facts that rendered the risk obvious —thereby meeting the subjective component of an Eighth Amendment violation as enunciated in *Wilson*—they would be charged with knowledge of the heightened risk to petitioner. This is the thrust of *Canton*: where the risk is obvious, disregarding that risk is construed as a deliberate choice on the part of prison officials or policymakers and, therefore, a violation of the Eighth Amendment.

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sistent with a deliberate choice or intent. Respondents concede that the *Canton* standard is consistent with the mental element standard of *Wilson*. (Respondents' Brief at 24-25.)

[10] Respondents' brief repeatedly suggests that petitioner is asking this Court to adopt a tort "negligence" standard. (Respondents' Brief at 9, 20-22.) Petitioner's Brief at 20, however, explicitly disavows a negligence standard, as do *Canton* and *Young v. Quinlan*, cases that set forth the deliberate indifference standard petitioner urges.

III. THE CRIMINAL "ACTUAL KNOWLEDGE" STANDARD SHIFTS THE DUTY OF MONITORING PRISONER SAFETY FROM OFFICIALS TO THE VERY PRISONERS THEY ARE CHARGED WITH PROTECTING

The narrow disagreement between the parties pertains to the circumstance in which a defendant-official fails to recognize an obvious and unreasonable risk. The "reasonable safety" guaranteed to prisoners by the Eighth Amendment requires constitutional protection for prisoners in such circumstances. Unlike the "negative liberties" embodied in most of the Bill of Rights, the Eighth Amendment carriers with it affirmative obligations. Those obligations—to provide "basic human needs, such as food, clothing, shelter, medical care, and reasonable safety"—are owed only to persons restrained by the state, and they arise precisely from the limitations that the state has imposed on those persons' freedom to act in their own behalf. *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 200 (1989). To hold that a person wholly incapacitated by the state is not entitled to protection from such obvious dangers would disregard the realities of incarceration and the restrictions on prisoners' ability to avoid violence or to defend themselves from it. In the context of prison life, a standard so undemanding of prison officials simply does not provide for "reasonable safety."[11] It would be an odd affirmative constitutional

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[11] The restraints of penal confinement are extreme. Prisoners must live where they are told, work when and where they are told, go to meals and other daily activities when and where they are told, and associate with those who, also by command of the state, are present in those living, working, and other environments. Prisoners have no option to move, to stay home from work, or to change their routine to avoid dangers that they know or suspect. They are forbidden to arm themselves and may be harshly disciplined for self-defense. In these respects, they are completely dependent on the good will and competence of the state and its employees, not merely to maintain them (as by provision of food, clothing and shelter) but to protect their health, safety and lives from the dangers of the prison environment.

duty if an official could violate the duty only by possessing a state of mind equivalent to that required for second degree murder. *Cf. Franzen*, 780 F.2d at 652.

Moreover, the respondents' standard shifts this affirmative duty of monitoring prisoner safety from officials to the very prisoners who are at risk. It is petitioner's position that her *status* as a young, slight, transsexual in the general population of this maximum security penitentiary created an obvious, unreasonable risk of harm. The respondents purport to repudiate the Seventh Circuit requirement of actual notice.[12] However, because it does not charge officials with knowledge of obvious risks, respondents' standard would still require a vulnerable prisoner who is incarcerated and supervised by officials who do not recognize obvious risks to keep the officials informed of such risks. Such a requirement is impractical because the staff are necessarily likely to have more knowledge of specific risk factors, such as the prevalence of assault, than will any individual prisoner. One way

[12] Although respondents concede that a notice requirement will not apply in *all* circumstances, they emphasize in their Statement of Facts that petitioner did not affirmatively *request* administrative segregation at Terre Haute. (Respondents' Brief at 4.) This fact does not carry the importance suggested by respondents. Petitioner, who was new to Terre Haute, necessarily had less information about her risk in general population than did respondents. Moreover, a notice requirement fails to take into account the realities of prison life. Attempting to notify prison officials of a threat in itself may substantially increase the danger to the prisoner by inviting retaliation. *See* Scott Rauser, Comment, *Prisons Are Dangerous Places: Criminal Recklessness as the Eighth Amendment Standard of Liability in McGill v. Duckworth*, 78 Minn. L. Rev. 165, 188-90 (1993); *cf. Redman v. County of San Diego*, 942 F.2d 1435, 1438 (9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 972 (1992) (Prisoner plaintiff reported sexual threats to family member, who informed staff. Staff then questioned plaintiff in presence of prisoner who had raped him). Moreover, some vulnerable prisoners may lack the mental capacity to complain to prison officials. *See, e.g., Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988).

to illustrate the absurdity of the respondents' position is to imagine such a conversation between petitioner and respondents prior to her placement in general population:

> Petitioner: I am a transsexual.
>
> Respondents: We know that.
>
> Petitioner: I am 25 years old and of slight build.
>
> Respondents: We know that.
>
> Petitioner: USP-Terre Haute is a maximum security facility that houses extremely violent and aggressive individuals.
>
> Respondents: We know that.
>
> Petitioner: Well then, you know that, because of this, I am at risk of harm if I am placed in the general population.
>
> Respondents: Why?
>
> Petitioner: Because I'm a young, slight, transsexual and Terre Haute is a maximum security facility.[13]

The same ridiculous conversation would be required of informants, police officers, and other prisoners who are *obviously* at risk of harm by virtue of their status and who are unlucky enough to be housed by prison officials who fail to recognize obvious risks. Similarly, the respondents' standard would suggest that prisoners who are about to be issued contaminated blankets, when prison officials *know* that the blankets are contaminated, must nevertheless *tell* prison officials that issuance of the blankets is likely to result in harm. In these examples, both the prisoner and the prison officials know the underlying facts which give rise to the risk, and the prisoner's failure to complain cannot excuse the officials' failure to act. A contrary ruling would be ludicrous, and is certainly not constitutionally required.

[13] Of course, in this case petitioner also alleged that respondents had additional knowledge of the risk. *See* discussion *infra* Section V.

IV. THE ARGUMENTS OF STATE AMICI ARE UNPERSUASIVE

State amici argue that petitioner urges a *per se* rule that a transsexual cannot be confined in general population. (Amici Brief at 6-7.) This is not her position. Rather, petitioner seeks an opportunity to prove that it was deliberate indifference in this case to fail to protect her in this maximum security facility. Amici's argument is equivalent to arguing that *Helling v. McKinney*, 113 S.Ct. 2475 (1993), stands for a *per se* rule that exposure to environmental tobacco smoke violates the Eighth Amendment. Rather, *Helling* granted the plaintiff an opportunity to prove a constitutional violation under the standard articulated in the case. In this case, the petitioner was never given an opportunity to develop the record as to whether or not confining her in general population at Terre Haute posed an obvious and unreasonable risk.

Amici's other central argument is that this Court should apply a heightened deliberate indifference standard in the specific area of prisoner safety. (Amici Brief at 9-14.) This argument, however, is foreclosed by *Wilson*, which explicitly stated that the same deliberate indifference standard applicable to medical claims and other conditions of confinement applies to failure to protect claims. *Wilson*, 111 S. Ct. at 2327.[14]

Amici's claim that many prisons are dangerous is true. (Amici Brief at 24-25.) But petitioner readily concedes that not every prison assault amounts to a constitutional violation. Rather, a violation will be found only where the objective and subjective components of an Eighth Amendment violation are satisfied. That constitutional

[14] Indeed, the Court cited failure to protect cases in reaching that conclusion. *Wilson*, 111 S.Ct. at 2327 (citing *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987)); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988).

violations are frequent, if true, would support vigorous enforcement of the Constitution. It ought not alter the standard by which such violations are judged.

Finally, it is not true, as amici argue, that adoption of petitioner's standard would work a "radical transformation" in the meaning of deliberate indifference. (Amici Brief at 25.) In fact, the opposite is true: a "radical transformation" would occur only if this Court were to adopt the criminal standard that amici advance. As set forth in petitioner's opening brief, and challenged by neither respondents nor amici, the great majority of lower courts to consider the issue have in fact employed the deliberate indifference standard urged by petitioner. (*See* Petitioner's Brief at 36.)

V. THIS CASE MUST BE REMANDED

Respondents concede that evidence that a risk is obvious may be introduced to show that respondents knew of the risk. Petitioner's discovery request, which was denied by the district court, was designed to develop evidence of the level of violence at Terre Haute. This information, known to respondents but not to petitioner, was directly related to whether the risk faced by petitioner at Terre Haute was or was not obvious. (*See* Petitioner's Brief at 8-9.) Thus, under either the standard urged by petitioner or respondents, the court's failure to allow the discovery calls for reversal of summary judgment.

Moreover, there was ample evidence in the record, not considered by the district court, that respondents actually knew of the risk facing petitioner; the respondents' bald statements otherwise, which are significantly undercut by the record, cannot be dispositive.[15] For example, the

[15] Respondents argue that they "either denied personal knowledge that petitioner would be subjected to an increased danger as a result of his transfer, denied responsibility for the transfer or both." (Respondents' Brief at 26.) The record does not support this statement. For example, respondent Brennan did not address

the district court failed to consider respondent Edwards' declaration in a prior case that he believed that petitioner could not be safely placed in general population at another Bureau of Prisons maximum security facility. *Farmer v. Carlson*, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988). Nor did the district court consider the finding in that case that "clearly, placing [Dee Farmer], a twenty-one year old transsexual, into the general population at Lewisburg, a Level Five security institution, could pose a significant threat to internal security and to plaintiff in particular." *Id.*[16]

Respondents argue that the transfer of petitioner to USP-Terre Haute was based on respondents' "good faith judgment." (Respondents' Brief at 21.) The record does not support that characterization. The single most distinctive fact about petitioner is undoubtedly her transsexual status; indeed, the record is full of references to her transsexuality. However, neither respondent Kurzydlo's disciplinary transfer memorandum nor the accompanying "comprehensive" progress report[17] contains a single reference to petitioner's transsexual status or possible risks she faced at USP-Terre Haute. The progress report notes the repeated periods of administrative detention at FCI-Lewisburg and other institutions, but does not refer to petitioner's transsexual status, which was the apparent reason for confinement in administrative segregation at those other institutions. Thus, the progress report gives the erroneous impression that this confinement may have been to protect the safety of others, not to protect petitioner. This impression is further supported by the fact that respondent Kurzydlo sought to transfer petitioner to USP-Leavenworth, a higher security facility than USP-Terre Haute. (*See* Kurzydlo Declaration, J.A. at 16-17.) The record suggests that prison officials may have considered petitioner both annoying[18] and litigious. The failure to mention her transsexuality, together with the implicit suggestion that she presented a risk to the safety of others, could have been motivated by the belief that such a presentation was likely to result in greater punishment of petitioner by leading to her transfer to USP-Leavenworth. In fact, if the transfer memorandum and progress report had explictly noted the risk posed by petitioner's transsexuality, this would be a different case. It would not be a case about whether the respondents lacked actual knowledge of the risk, but rather a case about the appropriate response to a known risk. Instead, the transfer memorandum and progress report

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whether he knew of the risk, and he affirmatively indicated his personal involvement in signing the transfer order. (*See* Petitioner's Brief at 40 n.56.)

Respondents also argue that they could not have known of the risk in Terre Haute general population. This argument is inconsistent with the declarations of respondents Kurzydlo and Smith averring affirmative knowledge of conditions at Terre Haute. (Kurzydlo Declaration, J.A. at 17 ¶ 9; Smith Declaration, J.A. at 11 ¶ 4.)

[16] Respondents suggest that petitioner's previous request to be placed in general population housing in *Farmer v. Carlson*, 685 F. Supp. 1335, 1342 (M.D. Pa. 1988), undercuts her claim in this case. (Respondents' Brief at 20 n.11.) Petitioner sought *safe* general population confinement at Lewisburg. She never indicated that she was waiving her right to personal safety, although she may well have been mistaken about how safe she would be in general population at Lewisburg. Respondents' reference to this prior lawsuit highlights the central weakness of their proposed standard: it shifts to prisoners the responsibility for making appropriate placement decisions. In any event, the federal court in that case agreed with the arguments of the Bureau of Prisons that petitioner's safety required administrative segregation. *Id.*

[17] *See* Transfer Report, J.A. 24-31; *see also* Response to Interrogatories, J.A. at 36.

[18] The disciplinary offense that led to the transfer recommendation involved credit card fraud in the prison. The disciplinary hearing officer's report refers to "[p]reviously imposed sanctions for similar offenses [that] have failed to effect a positive change in inmate Farmer's institutional behavior and attitude." (Disciplinary Hearing Officer's Report, J.A. 22.)

inexplicably lack any reference to the risk to petitioner as a transsexual.[19]

Respondents also argue that summary judgment was appropriately granted on the issue of personal responsibility. While the record is fundamentally undeveloped on issues related to the respondents' personal responsibility, the record demonstrates that they in fact had the power to recommend that petitioner be housed in administrative segregation at Terre Haute: after the rape, and for reasons unrelated to it, the FCI-Oxford and North Central Region staff did make a recommendation for segregated confinement at Terre Haute, which was implemented. (*See* Edwards Declaration, J.A. at 94-95.) It is certainly likely that further development of the record on remand will show that whether a particular person is placed in general population or protective custody is generally determined by the recommendations and information accompanying the transfer dossier. Moreover, the district court did not even address the personal responsibility issue in its opinion granting summary judgment. Accordingly, this Court should remand this case for full development of the record on this issue.[20]

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[19] Another question that remains unanswered by this record is why respondents did not make the recommendation for administrative segregation at Terre Haute at the time of transfer, rather than one day after petitioner's rape. Certainly the information that petitioner was, according to respondents' records, a sexually active HIV-positive prisoner makes the risk of placing her in general population at USP-Terre Haute even more apparent.

[20] As discussed in the text, the issue of the current respondents' personal involvement in the events at issue remains undeveloped in the record. Nonetheless, upon remand, it may well be that the district court will be asked to consider allowing the joinder of additional defendants. Petitioner was unrepresented by counsel when she prepared and filed the pleadings and legal memoranda in this case. As a *pro se* litigant, petitioner's legal work is necessarily subject to a less stringent standard than formal pleadings prepared by attorneys. *See Haines v. Kerner*, 404 U.S. 519 (1972). Moreover, the fact that there may be additional potential defendants does not prove a lack of personal responsibility on the part of these defendants.

Finally, respondents argue that the defendants sued in their official capacity, and therefore liable only for prospective injunctive relief, are no longer liable because petitioner's request for injunctive relief was mooted by her assignment to administrative detention. (Respondents' Brief at 28-29.) This position is erroneous. Despite respondents' suggestion otherwise, petitioner has since been transferred out of administrative detention into general population at FCI-Florence, a medium security facility.[21] Indeed, petitioner continues to be at risk of inappropriate classification in Bureau of Prisons facilities, placing her in danger of future assault by other prisoners. Moreover, subsequent remedial actions by prison officials do not automatically foreclose a prisoner's opportunity for injunctive relief without a factual determination by the district court as to the risk of future harm. *Helling v. McKinney*, 113 S.Ct. at 2481. In *Helling*, the plaintiff had been moved to another facility and thus was no longer the cellmate of a five-pack-a-day smoker, and the state prison system had adopted a smoking policy that restricted smoking to specifically designated areas. Notwithstanding the changed circumstances, this Court remanded the case to provide an opportunity to the plaintiff "to prove that he will be exposed to unreasonable risk with respect to his future health or that he is now entitled to an injunction." *Id.* at 2482. Similarly, in this case, the petitioner alleges a continued threat to her safety.

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[21] The Bureau of Prisons regulations cited by respondents (Respondents' Brief at 28 n.13), to support the argument that petitioner's case is moot call for discretionary, rather than mandatory, segregation: "[T]he [Bureau of Prisons] *may* place in controlled housing status an inmate who tests HIV positive when there is reliable evidence that the inmate may engage in conduct posing a health risk to another person." 28 C.F.R. § 541.60 (1992) (emphasis added). Accordingly, even if petitioner were housed in administrative detention, she could be moved at any time.

CONCLUSION

For the above reasons, petitioner urges the Court to reverse the decision of the court of appeals affirming the grant of summary judgment to the respondents, and to remand to the district court for trial.

Respectfully submitted,

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(8)

No. 92-7247

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1993

DEE FARMER, PETITIONER

-v-

EDWARD BRENNAN, WARDEN, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE MONTANA DEFENDER PROJECT SUGGESTING REVERSAL

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INTEREST OF AMICUS CURIAE

The Montana Defender Project is a program of the School of Law at the University of Montana. Since 1966, the Montana Defender Project has represented inmates in the Montana Prison system in civil rights and post-conviction litigation. This brief amicus curiae is filed with the consent of the parties.

ARGUMENT

THIS COURT SHOULD ADOPT A STANDARD OF LIABILITY THAT IS LESS THAN THAT APPLIED BY THE SEVENTH CIRCUIT AND DIFFERENT FROM THAT APPLIED IN THE NINTH AND THIRD CIRCUITS

The deliberate indifference standard, first announced in *Estelle v. Gamble*, 429 U.S. 97 (1976), should be scrapped. The standard has proven too imprecise in the context of a prison society. This Court should incorporate objective standards that measure the variables of knowledge,

risk, harm, and burden of eliminating the risk. Objective standards may also be applied in the context of a prison riot.

Inmate upon inmate assaults pervade prison society. Assaults in prison have risen from 10,508 in 1989 to 12,189 in 1990 to 14,635 in 1991. U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics, 1992*, §6.124 (Kathleen Maguire, Ann L. Pastore, and Timothy J. Flanagan, eds., 1993); U.S. Dep't. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics, 1991*, §6.139 (Kathleen Maguire, Ann L. Pastore, and Timothy J. Flanagan, eds., 1992). Assault reports under-count the true level of violence because there is an unwritten code of silence that deters inmates from reporting assaults. *See, Alberti v. Heard*, 600 F. Supp. 443, 450 (S.D. Tex. 1984) (code of silence results in most violent acts in prison going undetected). *See also* Dinitz, *Are Safe and Humane Prisons Possible?*, 5 Australian & New Zealand J. Criminology 3, 4

(1981). Inmate rape, inmate sexual assaults, and inmate prostitution, by which strong inmates victimize the weak, are commonplace events. This circumstance has been known to this Court for at least a decade. *See, United States v. Bailey*, 444 U.S. 394, 420-24 (1980) (Blackmun, J., dissenting); *cf.*, *Ingraham v. Wright*, 430 U.S. 651, 669 (1977) ("Prison brutality . . . is 'part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny") (*dicta*).

Inmate sexual assaults are common enough to warrant serious action and consideration by prison authorities. The Eighth Amendment "requires that inmates be furnished with the basic human needs, one of which is 'reasonable safety.'" *Helling v. McKinney*, 113 S.Ct. 2475, 2480-81 (1993). When an inmate assault is foreseeable, prison authorities should be held to a higher standard of care than that set out in *Estelle*, depending upon officials' knowledge and the de-

gree of risk of an assault.[1]

In *Estelle*, this Court was faced with the task of demarking the line between negligence and conduct that amounted to "unnecessary and wanton infliction of pain." 429 U.S. at 104. This Court held that deliberate indifference to serious medical needs of prisoners violated the Eighth Amendment. *Id.* *Estelle* explained that deliberate indifference would include intentional denial or delay of access to medical care, intentional interference with treatment, or medical "treatment" that amounted to indifference. *Estelle*, 429 U.S. at 104-05.

In *Whitley v. Albers*, 475 U.S. 312 (1986), this Court was presented with the question of the standard to apply when prison officials are required to act to protect inmates, staff, and property threatened by rioting inmates. This Court

[1]This Court has noted previously that something less than express intent to inflict pain but more than ordinary lack of due care is necessary to constitute cruel and unusual punishment. *Whitley v. Albers*, 475 U.S. 312, 327 (1986).

observed:

> The deliberate indifference standard articulated in *Estelle* was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities. Consequently, "deliberate indifference to a prisoner's serious illness or injury," *Estelle, supra*, at 105, can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.
>
> *Whitley* at 320

In *Whitley*, this Court declined to apply the deliberate indifference standard, asking instead "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320-21. In *Hudson v. McMillian*, 112 S. Ct. 995 (1992), this Court further explained its holding in *Whitley*:

> What is necessary to establish an "unnecessary and wanton infliction of pain, we said [in *Whitley*], varies according to the nature of the alleged constitutional violation. 475 U.S. at 320. For example, the appropriate inquiry when an inmate alleges that prison

officials failed to attend to serious medical needs is whether the officials exhibited "deliberate indifference." See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). This standard is appropriate because the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns. *Whitley*, *supra* at 320.

By contrast, officials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force. Despite the weight of these competing concerns, corrections officials must make their decisions "in haste, under pressure, and frequently without the luxury of a second chance." 475 U.S. at 320. We accordingly concluded in *Whitley* that application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"

Hudson, 112 S. Ct. at 998.

Finally, in *Wilson v. Seiter*, 111 S.Ct. 2321 (1991), this Court addressed the question of what state of mind must be shown in order to establish that prison conditions violate the Eighth Amendment. There the Court held that "wantonness of conduct does not depend upon its effect upon the prisoner", *Wilson*, 111 S.Ct. at 2326, but upon the constraints upon the official and that conditions of confinement would be measured against the deliberate indifference standard.

This line of cases establishes a spectrum of standards. When the prison's interest is paramount, as in a prison riot, *Whitley*, 475 U.S. at 321, a higher standard is applied. When the inmate's interest "ordinarily does not conflict with competing administrative concerns," a lesser standard of liability, deliberate indifference, is applied.

In the case of inmate assaults, the interests of the prison in maintaining security and its "obligation to take reasonable measures to guarantee the safety of the inmates," *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984), are congruent with the inmate's interest in avoiding the assault. *See*, *Hendricks v. Coughlin*, 942 F.2d 109, 112 (2d Cir. 1991) (ensuring inmate safety aids in the maintenance of order in the prison). In such an instance, adopting a standard of

liability less stringent than deliberate indifference does not implicate competing institutional interests.

When an inmate is confined, the government strips him of the means to protect himself. It forbids him access to means of self-defense. It blocks all avenues of escape from attack. It forces the inmate to rely solely upon the agents of the government for protection. *Davidson v. Cannon*, 474 U.S. 344, 349 (1986) (Blackmun, J., dissenting). Yet the government does more. An inmate who defends against an assault risks the most extreme punishments meted out by the criminal justice system.[2]

[2]At least fourteen states impose higher punishment for assaults or homicides committed in prison. *See*, Hawaii Stat. § 707-701 (1993) (death sentence may be imposed where inmate commits homicide while serving life sentence without parole); N.H. Rev. Stat. § 630:1(d) (1993 Supp.) (same); Ala. Crim. Code § 13A-5-40(a)(6) (1993) (death sentence may be imposed where inmate commits homicide while serving life sentence); Ark. Code Ann. § 5-10-101(a)(6) (1993) (same); Miss. Code Ann. § 97-3-19(2)(b) (1993 Supp.) (same); Del. Code Ann. 11 § 4209(e)(1)a (1993) (death sentence may be imposed for homicide committed while confined); Ga. Code Ann. § 17-10-30(b)(9) (1993) (same); Idaho Code Ann. §

The mere use of the undefined terms "deliberate indifference" and "malicious or sadistic imposition of pain" makes it difficult for the courts to apply these standards to the particular facts of the case before them.[3] Adopting a

18-4003(e) (1993) (same); Ohio Rev. Code Ann. § 2929.04-(A)(4) (1993) (same); Ore. Rev. Stat. Ann. § 163.095(2)(b) (1993) (same); McKinney's N.Y. L. Ann. § 125.27(1)(a)(iii) (1993) (same); Burns' Ind. Stat. Ann. § 35-50-2-9 (b)(9),(10) (1993) (aggravating circumstance that permits imposition of death penalty); Ill. Comp. Stat. Ann. Ch. 720 § 5/9-1(b)(10) (1993) (same); Mont. Code Ann § 46-18-220 (1993) (incarcerated inmate who commits homicide or aggravated assault may be sentenced to death or life imprisonment).

[3]*Compare*, *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 270 (1987) (§ 1983 liability against a municipality may be premised on failure to train amounting to "reckless disregard for or deliberate indifference to" individuals' rights) (O'Connor, J., joined by Rehnquist, C.J., White, J., and Powell, J., dissenting from dismissal of writ of certiorari); *DesRosiers v. Moran*, 949 F.2d 15, 19 (1st Cir. 1991) (knowledge of risk of impending harm that is easily preventable and failing to then act to prevent it constitutes deliberate indifference); *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981) (grossly negligent conduct creates a presumption of deliberate indifference); *Shaw v. Strackhouse*, 920 F.2d 1135, 1145 (3d Cir. 1990) (deliberate indifference requires a showing that the state actor was recklessly indifferent, grossly negligent, or deliberately or intentionally indifferent) (dicta); *Davidson v.*

standard such as "gross negligence" or "recklessness" or "reckless indifference" serves only to further muddy these cloudy waters.

Before there can be cruel and unusual punishment,

O'Lone, 752 F.2d 817, 828 (3d Cir. 1984) ("We thus reaffirm that actions may be brought in federal court under § 1983 when there has been infringement of a liberty interest by intentional conduct, gross negligence or reckless indifference, or an established state procedure"); *Doe v. Taylor Ind. School Dist.*, 975 F.2d 137, 149 (5th Cir.1992), *reh'g, en banc, granted*, 987 F.2d 231 (1993) (jury could find that supervisors' nonfeasance "was not merely negligent, but grossly negligent, reckless, or deliberately (consciously) indifferent; that [their] toleration of Stroud's alleged misconduct for so long communicated their tacit condonation of his malfeasance"); *Wade v. Haynes*, 663 F.2d 778, 780-82 (8th Cir.1981) (deliberate indifference can be inferred from evidence of defendant's constructive knowledge); *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc) (constructive knowledge); *Berry v. City of Muskogee*, 900 F.2d 1489, 1496 (10th Cir. 1990) (disregard of known or obvious risk very likely to result in violation of rights); *Hayesworth v. Miller*, 820 F.2d 1245, 1261-62 (D.C. Cir. 1987) (gross negligence may suffice); *with*, *Pressly v. Hutto*, 816 F.2d 977, 979 (4th Cir. 1987) ("deliberate or callous indifference of prison officials to specific known risks of such harm . . . ."); *Marsh v. Arn*, 937 F.2d 1056, 1061 (6th Cir. 1991) (actual knowledge of a genuine risk of injury to the plaintiff where officials refuse to take steps to protect the plaintiff from injury)

there must be "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 104. In the context of the Eighth Amendment, wantonness is the standard to which "deliberate indifference" or "maliciously or sadistically for the very purpose of causing harm" is applied. *Whitley*, 475 U.S. at 321. In the prison context, this Court may adopt a more predictable and objective standard than that of deliberate indifference by looking to the degree of knowledge of prison officials, the risk of a harmful event, the degree of harm likely to result from the event, and the burden that eliminating that risk imposes upon the prison. These four parameters provide an objective formula for determining when prison officials have acted wantonly.

We can identify four recognizable points on the knowledge spectrum: (1) Actual knowledge; (2) Actual knowledge inferred; (3) Constructive knowledge; and (4) Negligent failure to investigate. A prison official will have actual knowledge, for example, when he is present as an

incident begins or when he knows that an assault will take place at a particular time and place. Actual knowledge can be inferred from past events (such as history of inmate-inmate assaults sufficient to confer knowledge of a degree of risk) or from credible warnings lacking specificity of time and place. Constructive knowledge contemplates a lesser quantum or quality of information. For example, the fact that we know generally that inmates assault other inmates constitutes constructive knowledge. Finally, negligent failure to investigate is just that -- it contemplates an absence of knowledge that could have been obtained through reasonable investigation.

Risk refers to the probability of the occurrence of an event. That risk may range from great to slight or non-existent. It has no reference to harm, which is measured on a separate scale. (For example, a slight risk of a shooting nevertheless can, if it occurs, result in serious harm.)

The degree of harm serves a dual role. First, the

level or nature of harm provides the objective determination of whether there has been an infliction of pain for Eighth Amendment purposes. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Jordan v. Gardner*, 986 F.2d 1521, 1525-26 (9th Cir. 1993). Second, where the degree of harm that is likely to result from the risked occurrence is high, the prison official may be more culpable.

The final element, important in the Eighth Amendment context, is the element of burden of eliminating or avoiding the risk. It is this element that this Court has focussed on in the *Whitley/Hudson-Estelle/Wilson* spectrum of cases. When inmates riot, prison officials may be compelled to make decisions "in haste, under pressure, and frequently without the luxury of a second chance." *Whitley, above*, 475 U.S. at 320. They are faced with competing concerns for safety of inmates and safety of prison staff, visitors, and administrative personnel. *Id.* The constraints facing the official, which this Court has deemed material to the ques-

tion of wantonness, *Wilson*, *above*, 111 S.Ct. at 2326, constitute the burden of eliminating the risk of harm to inmates.

Applying this scheme to *Whitley*'s facts, we learn this. A prison official would have at least constructive knowledge that sending armed officers to quell a riot poses a slight to great risk (depending upon their training) of serious harm to inmates involved in the riot. However, the burden of eliminating the slight risk is heavy -- for example, sending in unarmed officers may result in serious harm to other inmates or staff.

Changing the facts, if the same official knows that because of officers' expressed intent to injure inmates or because of their lack of training, that there is great risk of serious harm, that official should be liable because the burden of eliminating the risk is slight. Indeed, the official should ensure that officers' instructions (i.e. rules of engagement) are clear.

In the realm of prison conditions, the same approach

is highly workable. An Eighth Amendment violation arises under *Wilson* when prison officials have actual knowledge or actual knowledge inferred of conditions that deprive "the minimal civilized measure of life's necessities," *Wilson*, *above*, 111 S.Ct. at 2324; *Rhodes* at 349,[4] coupled with constructive knowledge that the conditions in question fall short of the "minimal measure" threshold. In the conditions context, the question of risk arises only when the prison decides to embark upon a course which could deprive inmates of the minimal civilized measure of life's necessities. This approach also satisfies *Wilson*'s objection to distinguishing between "one-time" or "short-term" events and "systemic" or "continuing" conditions. *Wilson*, 111 S.Ct. at 2325. The test may be applied to either set of conditions.

Likewise, in the case of medical care, delayed treat-

[4]This minimal level of conditions also constitutes the threshold level of conditions that inflict pain under *Rhodes*' objective prong of Eighth Amendment analysis.

ment for a hang nail has consequences different from delayed treatment for a heart attack. Where the degree of harm from the risked occurrence is great, prison officials' actions or their failure to act may be considered "wanton." When we speak of the fourth element -- the burden upon the institution of preventing the risk (or the concomitant utility of not preventing the risk) -- as an example the need to treat inmates with more severe medical problems can justify delaying treatment of inmates with less severe medical problems.

In the case at bar, in the context of inmate assaults the application of the four element test becomes less problematic and turns largely upon the defendants' degree of knowledge. The element of burden on the institution is all but a nullity because the interest of the institution in preserving security and its "duty to take reasonable measures for the prisoners' own safety", *Washington v. Harper*, 494 U.S. 210, 225 (1990); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984), is congruent with the inmate's interest in avoiding

the risk of harm. That is, when the institution acts to prevent an assault, it carries out its institutional mission.

If the element of burden on the institution is a nullity, we are left with the elements of degree of knowledge, degree of risk, and degree of harm. For example, a prison official has at least constructive knowledge that placing a young, weak inmate with an inmate known to be an aggressive homosexual will result in a high risk of serious harm. *See*, *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc). When the risk of the occurrence and the harm likely to result are both great, prison officials' failure to act on constructive knowledge is irreversible. Whether prison officials place an inmate known to be "young and tender," with an inmate known to be an aggressive homosexual, *Redman*, *above*, or whether they place an inmate known to be a transsexual among inmates that they know to be dangerous and sexually assaultive, as in the case at bar, their actions must be viewed in that context. It should be no de-

fense that no harm was intended to Christians when throwing them to the lions because we could not say whether, on this particular occasion, the lions were hungry.

If we employ the Seventh Circuit's test, by the time prison officials have "actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm may be inferred from the defendant's failure to prevent it," *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991), the harm will likely have occurred.

Saying that prison officials have constructive knowledge that homosexual assaults and other violent acts occur in their institutions will not result in the imposition absolute liability under § 1983 without additional facts. These facts may include knowledge of prison conditions that contribute to inmate assaults coupled with a failure to remedy those conditions, *Wilson*, *supra*, or they could include knowledge of the nature of the inmate at risk or credible reports of threats to an inmate. *See*, *Wade v. Haynes*, 663 F.2d 778,

780-82 (8th Cir. 1981) (While there were no requests for help, deliberate indifference can be inferred from evidence of the plaintiff's susceptibility to assault, the cellmate's predilection, and the corresponding lack of due care).

Finally, this four part test does away with the "pure heart" defense. Requiring prison officials to take steps to protect inmates or to correct conditions when the requisite degrees of knowledge and risk exist would eliminate lip service as a defense to an inmate's claim.

The final question is, where among the permutations of these elements may the line be drawn to distinguish conduct that is wanton from conduct that is not? This question will be easy to answer in some cases and more difficult in others. For example, we can say that a prison administrator, faced with a decision to double-cell or build a new facility, has constructive knowledge that double-celling can result in some risk of increased inmate assaults. Depending upon the degree of risk (for example, it may be higher in maximum

security prisons than in minimum security prisons) her decision to double cell may or may not constitute a violation of the Eighth Amendment. However, if inmate assaults skyrocket as a proximate result of double-celling, it can be said that the failure to correct these conditions would constitute an Eighth Amendment violation. *Compare*, *Hovater v. Robinson*, 1 F.3d 1063, 1066 (10th Cir. 1993) (where jailer who raped female prisoner had not engaged in similar conduct in the past and where there was no history of similar conduct in the jail, no liability because no actual knowledge inferred); *with Jordan*, *above* (where prison had notice that female inmates had histories of sexual abuse, rape, and beatings, and had suffered injury from cross-gender search, it was deliberately indifferent where it permitted random cross-gender body searches knowing of the likelihood of harm and in the absence of the necessity for security purposes).

Nevertheless, when prison officials have constructive knowledge of a serious risk of great harm (such as rape or a

danger to life) to an inmate, then the failure to take measures to eliminate the risk should be considered wanton and therefore actionable under 42 U.S.C. § 1983 as a violation of the Eighth Amendment. In such an instance, prison officials' failure to exercise even slight care effectively condemns an inmate to the fate that awaits him.

CONCLUSION

The rising incidence of inmate assaults in American prisons and the ensuing victimization of more vulnerable inmates require Eighth Amendment scrutiny. This Court should substitute an objective test for the deliberate indifference standard of *Estelle*. Applying this four-part test to the case at bar, the Court should hold that the Court of Appeals and the District Court applied the incorrect standard. Summary judgement should be vacated and this case should be remanded.

Respectfully submitted,

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(9)

No. 92-7247

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

DEE FARMER, *Petitioner*,

v.

EDWARD BRENNAN, WARDEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF FOR D.C. PRISONERS' LEGAL SERVICES PROJECT, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus will address the following question:

Should the Court hold that prison officials must act with criminal recklessness in order for their conduct to constitute deliberate indifference under the Eighth Amendment?

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INTEREST OF AMICUS CURIAE[1]

Amicus D.C. Prisoners' Legal Services Project, Inc. ("The Project") is a non-profit organization that provides legal services to prisoners incarcerated by the District of Columbia. The Project currently represents plaintiff inmates in *Inmates of D.C. Jail v. Jackson*, 75-1668 (D.D.C.), an

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[1] Petitioner and respondents have consented to the filing of this brief. Letters are being filed with the Clerk of the Court herewith.

action challenging conditions of confinement in District of Columbia Jail, and is interested in developing the proper legal standard for determining whether prison officials have been deliberately indifferent within the meaning of the Eighth Amendment.

SUMMARY OF ARGUMENT

In *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), this Court held that prison officials must act with "deliberate indifference" in order for cruel prison conditions to violate the Eighth Amendment. The Court held that the deliberate indifference standard should apply to all challenges to conditions of confinement, including claims of inadequate medical care and inadequate protection from other inmates. This case presents the question of the proper interpretation of the deliberate indifference standard, and in particular, whether the Court should hold, as the court of appeals has, that deliberate indifference exists only if prison officials have acted with criminal recklessness.

Although *Wilson* did not detail the elements constituting deliberate indifference, the Court made clear that malice was not one such element. As the criminal recklessness requirement set forth by the court of appeals is tantamount to a requirement of malice, it is in conflict with this part of the holding in *Wilson*. Moreover, by selecting a malice-like standard and thereby permitting relief only in the extraordinary case of official criminality, the court of appeals' ruling unduly narrows the reach of the Eighth Amendment by foreclosing remedies for cruel prison conditions arising from the more common problems of bureaucratic apathy and institutional paralysis.

A criminal recklessness requirement would prove to be poorly suited to remedy the wide range of cruel prison conditions subject to the deliberate indifference standard. Many cruel prison conditions arise from the failure of the institution as a whole, and no one individual bears a share of the blame sufficient to be guilty of criminal recklessness. A pertinent example is the spread of tuberculosis currently facing many prisons. A criminal recklessness requirement would likely send the lower courts on a fruitless search for individual guilt and render them unable to correct grave prison conditions, such as those contributing to the spread of tuberculosis.

In comparison to the criminal recklessness requirement, the obvious, avoidable harm standard set forth in *City of Canton v. Harris*, 489 U.S. 378 (1989), is well suited for challenges to prison conditions under the Eighth Amendment. Under that standard, a plaintiff must show that officials failed to take action to redress a harm that was obvious and avoidable. The *Canton* standard serves to determine when the infliction of harm is attributable to the State as a deliberate choice. Such an analysis satisfies the requirements of *Wilson*. In addition, because the *Canton* standard was developed in the context of municipal (as opposed to individual) liability, it is well suited for determining the "mental state" of institutional entities like prisons.

The court of appeals rejected a *Canton* standard because it found that such a standard would unduly broaden the scope of prison officials' liability. Those fears are unfounded. The requirement under *Canton* that the harm be both obvious and *avoidable* will ensure that prison officials are not held strictly liable as a result of the inherent dangerousness of prisons. Moreover, established doctrines of qualified immunity

already ensure that individual prison officials are not held liable for damages for prison conditions beyond their control.

As the court below applied the wrong standard, the case should be remanded with instructions to reinstate the claim.

ARGUMENT

THE COURT OF APPEALS ERRED IN EQUATING DELIBERATE INDIFFERENCE WITH CRIMINAL RECKLESSNESS.

A. A Criminal Recklessness Requirement Is Contrary To The Decisions Of This Court And To The Proper Scope Of The Eighth Amendment.

In *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), this Court held that prison officials must act with "deliberate indifference" in order for objectively cruel prison conditions to violate the Eighth Amendment. *Id.* at 2326. The requirement of deliberate indifference arose from the Court's conclusion that the infliction of pain does not constitute "punishment" — thereby falling within the purview of the Amendment's prohibition on cruel and unusual punishment — unless the pain is inflicted deliberately, with "some form of intent." *Id.* at 2325. Rejecting a higher "malice standard" proferred by prison officials in that case, the Court determined that deliberate indifference to cruel prison conditions would suffice to elevate those conditions to the level of cruel and unusual punishment. *Id.* at 2326.

In this case, the district court dismissed petitioner's claim because it concluded that petitioner had failed to demonstrate that the respondents had acted with criminal recklessness. In

so doing, the court followed settled circuit law equating *Wilson*'s deliberate indifference standard with criminal recklessness. *See, e.g., McGill v. Duckworth*, 944 F.2d 344, 349-50 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992). This circuit law should be rejected here: the equation of deliberate indifference with criminal recklessness conflicts with *Wilson*'s rejection of a malice standard and improperly limits the reach of the Eighth Amendment.

The court of appeals' criminal recklessness standard is indistinguishable from the malice standard rejected by *Wilson*. For example, in *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986), the court instructed that, to act in a criminally reckless manner, an officer must be more than "willful and wanton" — he must be "willful and *malicious*." 780 F.2d at 654 (emphasis added). Similarly, under *McGill*, a prisoner must show that prison officials permitted cruel conditions "*because of*, rather than *in spite of*, the risk to him." *McGill*, 944 F.2d at 350 (emphasis in original).[2]

Such a criminal recklessness standard, as described by the court of appeals, is the same as the malice standard that the Court applied in the prison-riot context. *See Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) ("'whether force was applied in a good faith effort to maintain or restore discipline

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[2] The court in *McGill* held that, in order to succeed on his claim, the prisoner would have to demonstrate that the prison officials knew of the impending rape and could easily have prevented it, but instead stood by and let it happen. *See* 944 F.2d at 349 ("McGill had to show that the defendants had actual knowledge of the threat Ausley posed, that the rape was readily preventable, but that instead of intervening the guards allowed Ausley to proceed."). The court thus clearly equated criminal recklessness with malicious and sadistic conduct.

or maliciously and sadistically *for the very purpose of causing harm.*'") (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973)) (emphasis added). Indeed, *Whitley* cited the Seventh Circuit's criminal recklessness standard to illustrate the malicious and sadistic standard. *See id.* at 321 (citing *Franzen*, 780 F.2d at 652). But the Court in *Wilson* rejected the *Whitley* standard as inappropriate for use in challenges to prison conditions. *See* 111 S. Ct. at 2326-27.

The court of appeals' error is not in its characterization of the criminal recklessness standard, but rather in its selection of a criminal mental state requirement, especially one as high as criminal recklessness, to begin with. Whether criminal recklessness is equivalent to malice or falls just shy, it unquestionably demands a gross deviation from the conduct of law-abiding persons. *See* MODEL PENAL CODE § 2.02(2)(c). It is a high standard, one sufficient to support a conviction for second-degree murder. *See Franzen*, 780 F.2d at 652.

As a consequence, the criminal recklessness standard at the very least strains the *Wilson* framework. *Wilson* suggests that the necessary mental state to elevate the infliction of pain to the level of "punishment" should vary — ranging from deliberate indifference to malice — depending upon the "constraints" facing the official. *See Wilson*, 111 S. Ct. at 2326. Because criminal recklessness is so near malice, equating it with deliberate indifference severely confines this range.[3]

[3] Indeed, given the strong evidence in *Franzen* and *McGill* that criminal recklessness is malice, one might be tempted to state that the two ends of the range are separated from each other, at the most, by a legal quibble.

Moreover, there seems little warrant in the Eighth Amendment for the adoption of such a severe standard. The Eighth Amendment surely prohibits deplorable prison conditions that arise from bureaucratic apathy or institutionalized indifference as well as those arising from a criminal mindset. *See Rhodes v. Chapman*, 452 U.S. 337, 357, 358-59 (1981) (Brennan, J., concurring) (noting that cruel prison conditions typically arise from insufficient resources, gross managerial inattention, or institutional paralysis). As Judge Noonan has observed:

> The Framers were familiar from their wartime experience of British prisons with the kind of cruel punishment administered by a warden with the mentality of a Captain Bligh. *See* Robert Troup Affidavit (Jan. 17, 1777), in *A Salute To Courage*, at 66 (Dennis P. Ryan, ed. 1979). But they were also familiar with the cruelty that came from bureaucratic indifference to the conditions of confinement. *See* Letter from Robert Morris, George Clymer and George Walton to George Washington (Jan. 7, 1777), in 1 *Correspondence of the American Revolution*, at 324-26 (Jared Sparks, ed. 1853); Letter from Benjamin Lincoln to George Washington (Sept. 25, 1780), 3 *Correspondence of the American Revolution* at 96-98; Troup Affidavit, *supra*, at 67. The Framers understood that cruel and unusual punishment can be administered by the failure of those in charge to give heed to the impact of their actions on those within their care.

Jordan v. Gardner, 986 F.2d 1521, 1544 (9th Cir. 1993) (en

banc) (Noonan, J., concurring).[4] Making criminal conduct the touchstone of "punishment" under the Eighth Amendment thus denies that amendment its vital function: that of prohibiting objectively cruel conditions that result from deliberate official action or inaction. The Eighth Amendment proscribes cruel punishment, not merely evil punishment.

B. The "Failure To Prevent A Known Or Obvious Avoidable Harm" Standard Set Forth In *City of Canton v. Harris* Is Most Consistent With The Eighth Amendment.

In *City of Canton v. Harris*, 489 U.S. 378 (1989), this Court set forth the conditions under which deliberate indifference by government officials to a risk of harm will be deemed to constitute a "deliberate" or "conscious" choice to inflict the harm. *See id.* at 389. Deliberate indifference in this sense will arise either from knowledge of the risk or from sufficient "obviousness" of the risk that knowledge will be imputed. *See id.* at 390 n.10; *see also id.* at 396 (O'Connor, J., concurring in part and dissenting in part) (stating that deliberate indifference will arise from "actual or constructive notice" of the risk). In addition, the failure to heed the known or obvious risk must be "closely related to the ultimate injury." *Id.* at 391. In other words, the risk must not both obvious and avoidable.

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[4] For example, Robert Morris, George Clymer, and George Walton complained to George Washington that "[i]t is probable General Howe may say it is contrary to orders, and not with his knowledge, if our people suffer; but this is not sufficient." Letter from Robert Morris, George Clymer and George Walton to George Washington (Jan. 7, 1777), in 1 *Correspondence of the American Revolution*, at 326.

Canton provides the most appropriate interpretation of deliberate indifference for Eighth Amendment purposes. Because it ensures that the infliction of pain is attributable to the State as a deliberate choice, it satisfies the threshhold "punishment" requirement. In addition, for the reasons set forth below, the *Canton* standard has the flexibility — which a criminal recklessness standard lacks — to be applied in a meaningful away across the entire spectrum of cruel prison conditions to which the deliberate indifference standard applies.

Such breadth of application is important because *Wilson* held that the same deliberate indifference test must be applied to all challenges to prison conditions, whether the condition is lack of medical care, poor food, inadequate clothing, intemperate climate, or a failure to protect the inmate from assaults by other inmates. *See Wilson*, 111 S. Ct. at 2326-27. In addition, *Wilson* held that the same deliberate indifference standard applies whether the challenged condition was experienced by only a single inmate or was applied to all. *See id.* at 2324 n.1. Thus, consistent with *Wilson*, whatever interpretation of deliberate indifference the Court applies to petitioner's failure to protect claim will set the standard for all Eighth Amendment challenges to conditions of confinement.

In comparison to a criminal recklessness standard, the *Canton* standard is a far better tool for addressing two frequently-challenged types of prison conditions: the lack of basic medical care or the routine exposure of inmates to infectious disease. That these conditions can constitute an Eighth Amendment violation is incontrovertible. Because incarcerating a prisoner renders him unable to fend for himself, the Constitution requires the State to provide for his

basic human needs. *See, e.g., Helling v. McKinney*, 113 S. Ct. 2475, 2480 (1993); *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 199-200 (1989). Thus, the Eighth Amendment requires, for example, that prisoners be provided with basic medical care, *see Estelle v. Gamble*, 429 U.S. 97, 103 (1976), and be protected from routine exposure to infectious disease, *see Helling*, 113 S. Ct. at 2480; *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981).

The criminal recklessness standard is not well adapted to remedying violations of these obligations. Because the standard focusses on individual guilt, it overlooks prison-wide failures in which the fault is diffused over the institution as a whole. *See McGill*, 944 F.2d at 348-49; *cf.* Sayre, *The Present Signification of* Mens Rea *in the Criminal Law*, *in* HARVARD LEGAL ESSAYS 399, 408 (1934) (stating that the requirement of criminal intent was frequently abandoned "if the character of the offense is such that infraction involves widespread public injury, particularly if the effective administration requires prosecution on so wholesale a scale that individual states of mind cannot be looked into or cannot well be proved"). Lack of medical care or routine exposure to infectious disease typically results from the failure of the institution as a whole, and requiring the courts to search for criminal recklessness on the part of an individual prison official will serve only to stymie attempts at reform. This is true not only because no single individual is likely to bear such a substantial fraction of the guilt, but also because prison officials are likely to be rather resistant and uncooperative to attempts to label them as felons. *Cf. Franzen*, 780 F.2d at 652 (noting seriousness of crimes for which criminal recklessness is the requisite mental state).

The inadequacies of the criminal recklessness standard

become apparent if one attempts to apply the standard in the context of the current epidemic of tuberculosis in prison. Although it is a readily preventable disease, tuberculosis infection in recent years has become rampant in prisons, particularly within urban centers, that have failed to take the necessary measures against the epidemic rise of the disease. *See, e.g., DeGidio v. Pung*, 920 F.2d 525, 529 (8th Cir. 1990) (noting that while the first relevant case of active tuberculosis at the Minnesota Correctional Facility at Stillwater was discovered in 1982, within the next few years almost two hundred inmates became infected). This epidemic accordingly constitutes an important context to test the conditions under which a prison's failure to protect inmates from infectious disease may be remedied by a court.

The tuberculosis epidemic in prison typically results not from the *criminal* agency of prison officials but rather from a bureaucratic apathy preventing effective response. A good example is the District of Columbia Jail, where the spread of tuberculosis is due in part to a failure effectively to screen arriving inmates for tuberculosis.[5] The fault for this failure is diffuse. In part, it arises from the use of an outdated and inaccurate screening procedure. App. at 4A. In addition, the screening procedure is being performed improperly: skin tests are conducted improperly and recorded inaccurately by untrained personnel, possibly at night and in the dark. *Id.* Moreover, the Jail lacks medically effective isolation facilities. *Id.* at 6A. Medical personnel have failed to prescribe

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[5] Appendix A to this brief contains excerpts regarding tuberculosis in the Expert Reports on Medical and Mental Health Services at the District of Columbia Jail filed on September 15, 1993 in the consolidated cases of *Campbell v. McGruder*, 1462-71 (D.D.C.), and *Inmates of D.C. Jail v. Jackson*, 75-1668 (D.D.C.).

and follow up effective treatment for those tubercular inmates who are identified, particularly those stricken with the more recent, multiple-drug-resistant strains, *id.* at 5A-6A. The toll from these failures is unnecessary suffering and death. *See id.* at 6A-16A (reviewing patient histories). Moreover, these conditions remain unaddressed in D.C. despite the availability of more effective measures that have been adopted by similar correctional facilities in Chicago, Los Angeles, and New York City. *Id.* at 5A.

In light of the success of other prisons in stopping or slowing the spread of tuberculosis, conditions in the District of Columbia Jail likely represent a failure to prevent an obvious, avoidable harm under *Canton*.[6] *Cf. DeGidio*, 920 F.2d at 530-33 (analyzing spread of tuberculosis in Minnesota prison). However, because the spread of the disease results from the combined effects of multiple failures at several institutional levels, criminal recklessness on the part of any individual is unlikely to exist or, even if it existed, is unlikely to be found. Despite the obvious, avoidable harm, it is difficult if not impossible to identify any one individual who acted with criminal recklessness. Further, prison officials typically make some effort, albeit inadequate, to screen, isolate, or treat infected inmates, which efforts might well preclude a finding of criminal recklessness. *See id.* at 531 (reporting district court's conclusion that the institutional response to the tuberculosis outbreak, though inadequate, prevented a finding that prison officials "completely abrogated their duties to provide even minimal medical care").

[6] The court in *Campbell v. McGruder*, No. 1462-71, has recently ordered the District of Columbia to institute an effective screening and isolation procedure. *See* App. at 18A-20A; *cf. DeGidio*, 920 F.2d at 588 (affirming the district court's finding that tuberculosis screening in the Minnesota prison improved only as a result of judicial intervention).

By contrast, the *Canton* standard adapts readily to the tuberculosis context. The standard was developed originally to determine municipal liability and accordingly is well-suited to determining deliberateness in a context where knowledge and fault is diffused through institutional layers. *See Canton*, 489 U.S. at 388-89 (discussing difficulties in ascribing deliberateness to corporate entity). In addition, by requiring that the harm be obvious and avoidable the *Canton* standard ensures that the institution has notice of the problem and a fair opportunity to correct it before a constitutional violation will result. *See id.* at 395 (O'Connor, J., concurring in relevant part) (observing that the *Canton* standard ensures "some form of notice . . . and the opportunity to conform to constitutional dictates").

The criminal recklessness standard also fails in the context of infectious disease and lack of medical care because the standard focusses unduly on the immediacy of the harm and the specificity of the threat. For example, in *McGill* a prisoner sought damages arising from his sexual assault by another inmate. The court rejected the claim because the prisoner had failed to demonstrate that officials knew he was about to be attacked by that inmate, *see id.* at 349, and held that it was insufficient as a matter of law to show that officials knew of the more broadly defined risk of harm that assaultive inmates posed to young or vulnerable inmates generally, *see id.* at 350. Thus, to the Seventh Circuit it was irrelevant whether McGill could show that his assailant was known to be highly dangerous and that safety measures could have been readily adopted; no Eighth Amendment violation could result because officials did not know that the assailant would attack McGill instead of some other young and small

victim. *See also Ruefly v. Landon*, 825 F.2d 792, 794 (4th Cir. 1987) (requiring prison officials to be aware that assailant posed specific threat to that particular prisoner).

The *McGill* specific knowledge requirement would have even more dangerous consequences if it were extended to medical care cases. A prison medical staff that fails to respond to medical needs threatens to harm the entire prison population. In such circumstances, a prisoner likely cannot demonstrate the imminent, specific harm to himself necessary to satisfy the criminal recklessness standard. That standard will therefore prevent a court from granting relief to inmates who are threatened with harm but have not yet fallen ill or died.[7] *Cf. Morissette v. United States*, 342 U.S. 246, 256 (1952) (noting that one type of criminal statute for which a *mens rea* requirement has been abandoned is that for which violations "result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize").

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[7] For this reason, a criminal recklessness standard would be particularly ill-suited to cases in which inmates seek prospective injunctive relief. Because such suits focus on the likelihood of harm in the future, the requirement of knowledge of a specific, imminent harm may be impossible to prove. *See* Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541, 1578 n. 270 (1992) ("The Seventh Circuit required actual knowledge of a specific rape — a standard that makes prospective relief nearly impossible to obtain."). This limitation on prospective relief is contrary to a sensible interpretation of the Eighth Amendment. *See Helling*, 113 S. Ct. 2481 ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."). Under the *Canton* standard, by contrast, prospective relief would be available if defendants had notice of the cruel conditions and the conditions were avoidable.

A standard that permits routine exposure to infectious disease — merely because one cannot foretell with certainty the precise identity and circumstances of the next victim of a prison-wide danger — does not properly implement the principles of the Eighth Amendment. As this Court observed regarding exposure of inmates to hepatitis and venereal disease, "[t]his was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed." *Helling*, 113 S. Ct. at 2480.

C. The Reasons Set Forth By The Court of Appeals For Rejecting An Obvious Avoidable Harm Standard Are Unpersuasive.

In *McGill*, the court of appeals expressly rejected an interpretation of deliberate indifference similar to the obvious, avoidable harm standard advanced here. *See* 944 F.2d at 348. The court concluded that this standard would impose too much liability on prison officials. *See, e.g., id.* (criticizing a should have known standard as "approach[ing] absolute liability"). This was so, reasoned the court, because "[p]risons are dangerous places," and therefore "it will *always* be possible to say that the guards 'should have known' of the risk." *Id.* at 345, 348 (emphasis in original). In addition, the court observed that many of the factors that make prisons a dangerous place are beyond the control of prison officials, and therefore the Eighth Amendment should not force prison officials to bear the costs of decisions made elsewhere. *See id.* at 348-49. Both of the court's reasons are meritless: the obvious, avoidable harm standard does not amount to absolute liability and the court's concerns regarding official liability fail to distinguish between the sub-

stantive elements of an Eighth Amendment violation and issues regarding the proper remedy.

The *McGill* court simply erred in concluding that, because prisons are "dangerous places," the *Canton* standard will amount to absolute liability. The court neglected to note that, under *Canton*, the obvious harm must also be *avoidable* in order to give rise to deliberate indifference. In other words, before a failure to respond to an obvious harm will give rise to a violation, the prisoner must demonstrate that the failure to respond is "closely related" to the harm. *Canton*, 489 U.S. at 391. Indeed, the Court in *Canton* expressly recognized that, in contexts where harm is endemic, the requirement of avoidability serves to *forestall* absolute immunity. *Id.* at 391-92 (stating that causation requirement will prevent injuries resulting from constitutional violations by the police from invariably giving rise to municipal liability).

To the extent that "prisons are dangerous places," it is less likely that a given assault is avoidable: If the prisoner complains that the threat of assaults on the general population was obvious, then he must also demonstrate that those assaults could have been avoided generally, a difficult standard to meet. On the other hand, if the prisoner alleges a threat specific to himself, then the *obviousness* standard will clearly be more difficult to satisfy.[8]

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[8] Nor will it necessarily be easy for a plaintiff to prove avoidability in an individual case. While this Court has stated that the question is open whether insufficient resources is a defense to liability, *see Wilson*, 111 S. Ct. at 2326, the Eighth Amendment certainly does not demand that prison resources be infinite. And, of course, a claim for additional resources is likely to be less compelling when the prisoner complains of a danger (continued...)

This sliding scale of obviousness and avoidability, which permits the *Canton* standard to adapt to both general and specific threats, is a direct result of that standard's origin in the concept of "deliberate indifference." A prison official can only be deliberately indifferent to a matter if attention is due that matter. Attention is only due to those matters which are both substantial enough to warrant attention — *i.e.*, obvious — and within the official's power to fix — *i.e.*, avoidable.

The court of appeals in *McGill* was also wrong to reject the *Canton* standard out of a concern that prison officials will be held personally liable for harms beyond their control. As an initial matter, the court of appeals was apparently mistaken in its basic premise; under settled immunity doctrine, prison officials are normally shielded from personal liability for harms beyond their control. *Compare Youngberg v. Romeo*, 457 U.S. 307, 323 (1982) (holding that "[i]n an action for damages against a professional in his individual capacity . . . the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints") *with McGill*, 944 F.2d at 350 (concluding that a proffered "'should have known' approach" would "hold[] guards personally liable for the consequences of budgetary decisions made elsewhere").

But even putting aside the court of appeals' likely misreading of immunity doctrine, its reasoning is fundamentally misdirected. The court allowed its remedial concerns regarding the scope of official liability for damages to control

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[8] (...continued)
specific to himself rather than one that threatens the entire prison population.

its analysis of the substantive reach of the Eighth Amendment. Such reasoning clearly produces deleterious consequences: seeking to prevent monetary awards, it would also prevent injunctive relief where such relief was clearly warranted.

Even if cruel prison conditions arise from a combination of factors, some of which are external to the prison, government officials may nevertheless exhibit collectively the requisite "deliberate indifference" to those conditions by failing to remedy or ameliorate them. In such case, although any individual official will probably not have made all of the judgments responsible for the cruel conditions, the lawsuit will ensure that those officials who are in a position to improve those conditions are appropriately called upon to answer for them when sued in their official capacity.[9] To paraphrase *Wilson*, cruel prison conditions arising from diffused institutional indifference either constitute "punishment" or they do not; the impact on a prison official's pocketbook is simply irrelevant. *See* 111 S. Ct. at 2326.[10]

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[9] This point has not escaped the court of appeals, which appears to have applied a much less demanding standard in at least some suits including injunctive relief. *See Murphy v. Lane*, 833 F.2d 106, 108 (7th Cir. 1987) (stating that deliberate indifference may be demonstrated by repeated negligent acts or systemic deficiencies); *French v. Owens*, 77 F.2d 1250, 1254 (7th Cir. 1985) (applying repeated negligent acts or systemic deficiencies standard), *cert. denied*, 479 U.S. 817 (1986); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983) (determining that repeated acts of negligent medical care constitute deliberate indifference), *cert. denied*, 486 U.S. 1217 (1984).

[10] *Amicus* recognizes that *Wilson* leaves room for "institutional constraints" to affect the level of wantonness necessary to give rise to an Eighth Amendment violation. *See* 111 S. Ct. at 2326. However, concerns (continued...)

* * * * *

The court of appeals incorrectly applied the heightened standard of criminal recklessness to the claim that prison officials were deliberately indifferent to the petitioner's safety. Accordingly, the judgment should be vacated and the case remanded for further consideration under the proper standard. *See Wilson*, 111 S. Ct. at 2328.

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[10] (...continued)
regarding the personal liability of prison officials could only conceivably be such a "constraint" if they were not adequately addressed by doctrines of official immunity. As shown in the text, however, those doctrines are more than adequate to address the concerns raised by the court of appeals.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEONARD CAMPBELL, *et al.*, Plaintiffs, v. ANDERSON McGRUDER, *et al.*, Defendants.	)	C.A. No. 1462-71 (WBB)
INMATES OF D.C. JAIL, *et al.*, Plaintiffs, v. DELBERT C. JACKSON, *et al.* Defendants.	)	C.A. No. 75-1668 (Cases consolidated before Judge William B. Bryant)

EXPERT REPORTS ON THE MEDICAL AND MENTAL HEALTH SERVICES AT THE DISTRICT OF COLUMBIA JAIL

September 15, 1993

REVIEW OF MEDICAL SERVICES IN THE CENTRAL DETENTION FACILITY (CDF)

Campbell v. McGruder and *Inmates of D.C. Jail v. Jackson*

September 15, 1993

Robert L. Cohen

INTRODUCTION

The following report on medical services at the Central Detention Facility (CDF) was carried out at request of Grace Lopes, Esq., Special Officer for the Court, appointed in the matter of *Campbell v. McGruder* and *Inmates of D.C. Jail v. Jackson*, by U.S. District Judge William B. Bryant. Ms. Lopes requested that I review the medical services at the Jail to see if they are compliant [*sic*] with the Court's requirements, and to review staffing at the CDF.

* * * * *

TUBERCULOSIS

Tuberculosis is a problem in jails in the United States today. Tuberculosis is epidemic in the general society, and it is concentrated in urban jails which concentrate those affiliated with poverty and HIV infection, the two major risk factors for HIV infection.

Screening for tuberculosis has historically been based upon the PPD test, in which a small amount of purified protein from the tuberculosis organism is injected into the skin. Classically, if the person has been infected with tuberculosis there is a swelling at the area of injection and a chest x-ray is then taken to determine if the infection is latent or inactive. If active, the person is isolated and begun on treatment for tuberculosis. If latent, then INH, an anti-tuberculosis medication is usually recommended for chemo-prophylaxis, to prevent the development of tuberculosis in an infected individual without active disease.

There is good documentation of PPD screening at CDF. This is a complicated process, requiring visual inspection of each new prisoner between 48 and 72 hours after implantation of the PPD. I requested staff of the Special Officer to review PPD implantation and reading at CDF. This chart review of PPD screening over the past year provides documentary evidence that PPD reading is occurring at CDF. It must be noted, however, that prisoners claim that PPD reading is being performed by correctional officers in the middle of the night, in the dark, and that staff at Modular say that they have no confidence in PPD readings recorded at CDF and do not feel that actual reading is of the skin test is taking place. Implanting and reading PPD tests is a very labor intensive activity, and requires constant support and monitoring of staff. This function should be performed by the nursing department, by LPN's.

Unfortunately, the PPD test is no longer effective as a screening test for tuberculosis. Persons with HIV infection who have decreased immunity are often **anergic**, which means they do not respond with a positive skin test to organisms they have been previously infected with. Persons with HIV infection and decreased immunity are at substantially higher risk for tuberculosis. If they have active tuberculosis, however, they will not be identified by the PPD test because they are anergic; their PPD test will be negative.

This problem must be addressed. There are two approaches which can be taken. All incoming prisoners can have an admission chest x-ray immediately upon entry into the facility. This should detect all cases of active tuberculosis before there is an opportunity for spread within the facility to other prisoners and Department of Corrections' staff. This approach is currently being used in Chicago and

in Los Angeles and is being gradually adopted in New York City.

Another option is to screen all incoming prisoners for anergy by testing them with PPD as well as other substances (mumps, candida, etc.). If they react positively to the PPD, they get an X-ray; if they don't react to any of the substances they are anergic and they also get an X-ray. The second approach is much more complicated, and more likely to miss cases of active tuberculosis due to misreading of anergy testing.

There is no capacity for admission screening X-rays at the present time at CDF. Routing chest x-rays could be done but would require that the x-ray department stay open 24 hours a day. X-rays can be taken with current equipment or with special equipment designed for mass screening which take x-rays on 70mm film and are read through a special viewer. Although requiring an initial capital outlay, this system is efficient and would have great benefit for the jail as well as the community at large.

In D.C. today, as in other cities throughout the United States, there is a new tuberculosis epidemic of "Multi-drug resistant tuberculosis (MDR-TB)." This disease, which caused 18 deaths in the New York State Department of Correction two years ago, usually affects persons with HIV infection. It is caused by the same tuberculosis bacteria, but the disease responds poorly to the usual anti-tuberculous treatment. It must be diagnosed early, treated aggressively with up to six or seven medications, some of which must be given intravenously. There have been at least two cases of MDR-TB in CDF over the past two years. This disease is transmitted directly from one person to another in crowded

jails, and enhanced efforts to detect it prior to housing prisoners in the general population must be undertaken.

These questions are not abstract. Active tuberculosis is common in the CDF and often goes unrecognized and untreated or is inappropriately treated. I have reviewed documented cases of failure to diagnose and treat tuberculosis at CDF from 1990, 1991, 1992, and extending to the present. There are no adequate isolation facilities for patients with tuberculosis at CDF. A review of some of the recent experience with tuberculosis at CDF will be helpful to illuminate these issues.

Patient #12 -- The patient was admitted to CDF in February 1992. On 2/6/92 her PPD was positive. A chest x-ray was done and reported negative. She was not started on INH. On 6/19/92 she requested sick call, complaining of coughing. Her temperature was not checked and she wasn't examined.

On 6/25/92 she again complained of a cold. No examination took place. On 6/30/92 she complained of chest pain when breathing as well as chills and a headache. No chest X-ray was taken and she was given reflex (an antibiotic). On 7/8/92 she again complained of a cold. On 7/30/92 she complained of a cough. She was not examined and her temperature wasn't taken. Again on 8/2/93 she complained of a cough but wasn't examined.

She was re-admitted to CDF on 11/7/92. At that time her PPD was again noted to be positive but this time the chest x-ray was abnormal, showing infiltrates in the right upper lobe and the right lower lobe. The radiologist advised repeating the film in seven to ten days; this is a completely

inappropriate recommendation. The patient need immediate isolation and workup for tuberculosis. This was fortunately done and the patient was admitted to DCGH on 11/11/92.

She was discharged from DCGH two months later, in January, 1993, and returned to CDF. A positive culture was sent by District of Columbia Department of Public Health (DCDPH) to the CDC (Centers for Disease Control) on 1/1/93 to determine to which antibiotics the tuberculous bacteria were sensitive. The CDC reported back five weeks later, on 2/9/93 that the patient had multi-drug resistant tuberculosis, and that her infection was resistant to the usual medicines, including those she was being treated with: INH, Rifampin, Streptomycin, Ethambutol, and Pyrazinamide. The CEF was not informed of the multi-drug resistance until 3/12/93, although DCDPH own documents reveal that they logged in the sensitivity reports from CDC on 2/16/93. The patient was readmitted to CDGH 3/12/93. She had been at CDF with contagious, multi-drug resistant tuberculosis for at least six weeks following her initial discharge from DCGH, and probably for a significant period of time prior to the November admission.

She was discharged back to the CDF from DCGH on 5/12/93, and admitted to the infirmary. She was discharged on treatment with three drugs: Pyrazinamide, Cipro, and intravenous Kanamycin. Kanamycin is an antibiotic which can only be given by injection. Multiple drugs are given when active tuberculosis is being treated because there is less chance that the bacteria would become resistant to all three drugs at the same time. Failure to provide all the drugs usually results in death, as well as increased spread of MDR-TB.

When I reviewed the patient's infirmary chart on 6/1/93, I noted that she was not receiving kanamycin. I immediately notified the pharmacy staff who were aware that the medicine had been ordered one week before, but said they were unable to obtain it, even though she had been receiving it at DCGH. I also informed Dr. Edwards, the acting Chief Medical Officer, who said he was not aware of the problem. No efforts were made by any physicians, nurses, or pharmacists to obtain this critical medication even though the entire facility medical staff, as well as Mr. Henderson were well aware of this patient's diagnosis.

Patient #13

This patient was well known to Department of Corrections' medical services because of multiple previous admissions. He was admitted for the final time on 11/24/91. He was HIV positive. At that time he complained of a thirty pound weight loss. The history sheet notes that he was being treated for tuberculosis with INH and B6, drugs used for treatment of a positive PPD test, not for active tuberculosis. He had been PPD negative and had not had any history of tuberculosis four months earlier. His T-cells were known to be 96 in April 1991, indicative of severely impaired immune status. The history and physical examination was checked off as "normal" except for missing teeth. A chest X-ray taken on 11/24/91 was read as normal.

On 12/6/91 he was seen in the ID clinic by a physician assistant. No history was taken, no vital signs, no temperature, no weight, and no physical examination was performed of the eyes, the mouth, the abdomen. The note reports the 4/18/91 T-cells as 1344, even though they were actually 94.

The chest was examined and the patient was noted to have bilateral wheezing, but no diagnosis was made, no Chest X-ray was taken, and no treatment was offered.

On 12/8/91 he was brought to the clinic area at CDF as an emergency. He complained of increasing weakness and inability to walk or maintain his balance for a two week period. No examination was performed. No vital signs were taken. The physician assistant transferred him to the "medical step down unit" to be evaluated by a physician. No laboratory examinations were ordered, and no physical examination was performed to identify the extent or cause of his weakens and lack of balance.

He was not seen until the next day, 12/9/91. The physician's note reads: "Patient gives no complaints." No history was taken, no physical examination performed.

On 12/10/91 the physician's note reads "Patient states that he is here for evaluation. T (temperature) 102F. Plan: to DCGH. Trip ticket completed." Again, no history was taken, no physical examination performed.

The next chart note is from December 12, 1991, two days later. {Patient has no consult report from DCGH. Patient sent to DCGH (trip ticket completed) 12/10/91. No history, no physical examination, no temperature taken.

A physician next saw the patient in the step-down unit on 12/13/91. The complete note reads "Patient transferred to Infirmary for more direct nursing care." Again there was no physical examination, no vital signs taken, and no history obtained. No laboratory tests were ordered. He received AZT and Bactrim while in the infirmary, no INH, B6 or

other anti-tuberculosis medication.

The next physician visit was four days later, in the infirmary, on 12/17/91. According to the nursing notes, the patient said "I'm hurting." At this time the patient was noted to have a temperature of 103.6 and was sent for a chest X-ray. No physical examination was performed. The X-ray was abnormal and the patient was sent to DCGH. On admission he was noted to be profoundly anemic, requiring blood transfusion. At DCGH he was diagnosed with active tuberculosis. He was sent back to DC Jail briefly but was returned because there were no infirmary beds. He died at DCGH of resistant pulmonary tuberculosis. According to the DCGH death summary, the patient had been admitted to DCGH previously for active pulmonary tuberculosis.
Comment:

The treatment received by _____ was callous, incompetent, failed to diagnose and treat early a disease which is fatal unless diagnosed early and treated aggressively. This lack of care for an obviously serious medical problem also subjected the entire CDF population, prisoners and staff, to active, drug-resistant tuberculosis. On admission _____ told the medical staff he was being treated for tuberculosis. They failed to follow-up and he wa without effective anti-tuberculosis treatment for over three weeks. The drug he was prescribed (INH) does not treat active tuberculosis, and taking it alone in the presence of active tuberculosis just increases the chance of development of resistant tuberculosis, which is what happened to _____ and caused his death.

_____ complained of weight loss, dizziness, loss of balance, and difficulty walking but none of these complaints

were addressed in any manner during his three weeks at CDF. His dizziness would have been promptly explained had the facility ordered a complete blood count. This should have been done routinely for a patient with AIDS on AZT on entry into the facility.

The lack of care _____ received contributed to his death from tuberculosis, and caused his unnecessary pain and suffering. The failure to examine him and to talk to him resulted in the increased suffering and the exposure of prisoners and staff to resistant pulmonary tuberculosis. The lack of access to medical care in the "Medical step-down unit" and int he infirmary are consistent with my review of medical charts and observation of nursing and physician activity in the infirmary in June, 1993.

Patient #14 -- This patient died from tuberculosis. His treatment at CEDF was incompetent and irresponsible; he was HIV positive and had active tuberculosis, documents on chest x-ray at the facility for a year before he was diagnosed and treatment could be started.

The patient was admitted to CDF on 11/31/89. At that time he told the facility he was HIV positive. No PPD test was done. He weighed 175 pounds.

A history and physical form labeled "In Transit" and dated 2/6/90 fails to note his HIV positive status, as does a clinical history dated 3/11/90; a problem list from this date fails to note his HIV status. His weight was then 160 pounds.

On 3/14/90 he was noted to weight 155 pounds. He came to sick call with a complaint of a cold and was given

aspirin and cold tablets. A chest X-ray was ordered.

On 3/23/90 he returned for follow-up and complained of a continuing non-productive cough. At this time he was noted to have oral thrush, and was given mycelex troches. Although laboratory studies were ordered on 3/14/90 and the results received back on 3/16/90, these results are not mentioned in the chart. They show that the patient had T-cells of 170, and was at high risk for pneumocystis carinii pneumonia, but no prophylaxis was given. This has been standard procedure since at least 1988. The patient was started on AZT.

On 3/26/90 he complained of right sided chest pain which increased with breathing and with coughing. He was given motrin. The notes says "Check on Chest X-ray." He returned to the clinic on 4/2/90 and said he felt better. The X-ray was never checked. In fact, the X-ray was not done until 4/08/90, at which time it was abnormal and showed a left upper lobe infiltrate. The radiologist, Dr. Zellis advised "repeat in 7-10 days." The reason for this recommendation is not clear. Tuberculosis most typically present as an upper lobe infiltrate, and this finding should always prompt the radiologist to recommend that the clinician ascertain if the patient has tuberculosis.

An undated note placed between the 4/12/90 note and a 5/3/90 chart entry records the abnormal chest x-ray, mentions the possibility of tuberculosis and orders sputum for AFB. There is no record that this study was ever performed. The 5/3/90 note does not follow up on this. There are monthly chart entries each of which has no physical examination, no history, and no vital signs, but just refills of the AZT ordered in April. No laboratory testing to look for

the common side effects of AZT were ordered.

Finally, on 9/21/90, a follow-up X-ray, as suggested in April, was ordered. This film was never taken. Blood tests were obtained however, and demonstrated severe anemia, with an hematocrit of 23.7%. Although noted, no action was taken to identify the cause of the anemia (decreased red blood cells) or to correct it. The patient was continued on AZT, the most likely cause of this severe anemia.

During the next several months he had several episodes of blood in his urine. No examination was performed to identify the cause of this finding, which is associated with tuberculosis.

The next blood tests were obtained on 3/7/91. They showed that the patient was even more severely anemic, with a hematocrit of 19.9, a critical level. The patient was admitted to DCGH for transfusion where the diagnosis of tuberculosis was finally made.

He was returned to CDF on 4/7/91 where he was housed on the medical step down unit. Although the discharge medications ordered by DCGH were INH, Rifampin, and PZA, the anti-tuberculosis medications he was given at CEDF were INH and PZA only, an ineffective treatment for pulmonary tuberculosis in a patient with HIV infection. He was then transferred to Lorton where he was continued on only INH and PZA and placed in general population.

On 5/2/91 his first follow-up visit, other than an encounter for constipation, the patient complained of productive cough and fever. The chart notes the 3/7/91 blood test results, and orders a follow-up CBC and chest x-

ray. This X-ray request noted that the patient had active tuberculosis and was on therapy. Dr. Zellis again read the film, compared it with the 3/22/90 x-ray, and noted consolidation in the left upper lobe. He advised "re-ray in 7-10 days to rule out an underlying neoplasm." No action was taken as a result of this abnormal X-ray.

On 6/12/91 the patient came to clinic complaining that he had not been receiving HIV or TB medications for more than a week. His weight was recorded as 124 pounds. Labs obtained 6 weeks earlier, on May 3, 1991, showed the patient was again severely anemic with a hematocrit of 23.4%. The patient was again admitted to DCGH for transfusion. He returned to CDF on 6/17 and was transferred him back to Lorton. The physician's 6/19/91 note includes no physical examination of the patient and reads:

"S: (subjective) This 50 year old male
HIV positive. Had Pneumonia 8
weeks ago. No pneumocystis. Took
AZT, became anemic. Was transfused
in DCGH. Discharged 2 days ago.
Was at Occoquan. Wants to go back.
O: (objective) Alert in NAD (no acute distress)
A: (assessment) HIV Disease
P: (plan) Return to Occoquan
(signature)

There are no further medical chart notes until 8/1/91, when the patient was admitted back to CDF from Howard University Hospital where he had been for 22 days. He was also noted to be severely jaundice with a total bilirubin of 9.4. The patient was discharged back to CDF with active tuberculosis requiring respiratory isolation. He actually had

two July, 1991 admissions to Howard: he signed out after three days and was then readmitted.

The patient was critically ill at that time and was sent back the next day, 8/2/91, to DCGH where he was found to be critically anemic with an hematocrit of 17.3. His chest x-ray showed a cavitary lesion of the left upper lobe, characteristic of active (and very contagious) pulmonary tuberculosis.

He died two weeks later. The death certificate does not mention tuberculosis although this was clearly the cause of death.

Comment: The care received by this patient is shocking. He had active tuberculosis for over a year while in Department of Corrections; custody without diagnosis. X-rays were interpreted inappropriately, not taken when ordered, and ignored when read. Anti-tuberculosis therapy was administered inappropriately if at all. A patient with active pulmonary tuberculosis was discharged into the general population without considering the risk to the population, and the Chief Medical Officer at CDF transferred the patient, just a few days after his discharge from DCGH, to Lorton without examining the patient or being aware that the had active pulmonary tuberculosis.

Additionally, the care received by this patient for his HIV disease was grossly inadequate, incompetent, and he was continually subjected to unnecessary suffering. He had untreated anemia exacerbated by continuing his AZT without monitoring and without treatment of his anemia. He never received PCP prophylaxis. He was almost never examined and he wasted away in front of the medical staff secondary

to treatable disease.

RECOMMENDATIONS:

1. A system for effective TB screening must be put in place immediately. In the short run, a system of PPD and anergy testing of all incoming prisoners must be implemented. In the long run it is probably wise to develop the capacity to X-ray all new admissions. Additional nursing staff, preferably LPN's, will need to be hired to assure that this screening program is effective.

2. Protocols for diagnosing and treating patients with TB and active disease must be developed. Sputum induction performed in a safe isolation booth (a technique for obtaining sputum for microscopic examination and culture) should be available for patients with mildly abnormal chest x-ray's who are anergic or have positive PPD tests.

3. Tuberculosis medications must be provided and should be distributed to patients under direct observation. The procedures developed in the pharmacy for obtaining medications in emergencies must include those for obtaining the medications used in treating drug resistant tuberculosis.

4. Inmates should be questioned on admission about past history of tuberculosis and the jail should work out a cooperative system with the DCDPH tuberculosis registry for identifying inmates with known disease as well as those who

are PPD positive. There is probably a need for a full time public health worker from DCDPH at the CDF to maintain and update the registry, as well as support other activities regarding public health matters, particularly syphilis.

5. Patients with contagious tuberculosis should be kept in appropriate isolation facilities; these do not currently exist at CDF and must be constructed at this or another facility. Until safe isolation areas have been identified and tested, patients with active tuberculosis must not be housed at CDF.

6. At least six CME lectures should be given annually for all medical staff regarding the diagnosis and treatment of tuberculosis.

7. Screening by X-ray or anergy should be accomplished at least annually for all Department of Corrections' staff, all contract workers at CEF, as well as for all long term prisoners.

8. Radiology services must be enhanced to provide x-rays within 24 hours for persons with positive PPD's or anergy. Radiology reports should aid in the rapid diagnosis of tuberculosis.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEONARD CAMPBELL, *et al.*,	)	
	)	C.A. No. 1462-71
Plaintiffs,	)	(WBB)
	)	
v.	)	
	)	
ANDERSON McGRUDER, *et al.*,	)	
	)	
Defendants.	)	
	)	
INMATES OF D.C. JAIL, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 75-1668
	)	(WBB)
DELBERT C. JACKSON, *et al.*	)	
	)	
Defendants.	)	

ORDER

Upon consideration of the Plaintiffs' Motion for Interim Relief, defendants' opposition thereto, the Special Officer's

Recommendations concerning Interim Relief, the Expert Reports on Medical and Mental Health Services at the District of Columbia Jail, and the record in this case, it is hereby

ORDERED that the plaintiffs' motion is granted; and it is

FURTHER ORDERED that within five days of the date of this Order, unless otherwise provided:

* * * * *

(12) The defendants shall chest x-ray or anergy test every prisoner on intake to the facility and promptly identify any prisoner suspected of suffering from infectious tuberculosis. The defendants shall, in consultation with the Special Officer and her medical expert, develop and implement, within two weeks of the date of this Order, a protocol identifying who shall receive chest x-rays and the procedure for tuberculosis screening on intake to the facility. Plaintiffs' counsel shall have an opportunity to review and comment on the protocol before it is finalized.

(13) The defendants shall identify appropriately equipped isolation rooms for persons with infectious tuberculosis and insure that all infectious cases are isolated.

* * * * *

So ORDERED this 9th day of November, 1993.

[signature]

William B. Bryant
Senior United States District Judge

No. 92-7247

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DEE FARMER, *Petitioner*

v.

EDWARD BRENNAN, WARDEN, *et al.*, *Respondent*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[redacted] BRIEF OF STOP PRISONER RAPE,
AMICUS CURIÆ
IN SUPPORT OF PETITIONER

Frank M. Dunbaugh,
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Counsel for Amicus

November 14, 1993

No. 902-7247

Dee Farmer, Petitioner
v.
Edward Brennan, Warden, et al., Respondent

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ

Stop Prisoner Rape (hereafter SPR) hereby respectfully moves this Honorable Court for leave to file this attached brief as *amicus curiæ* in the above-captioned case and as grounds for this motion states: (1) SPR is a national association founded in 1979 as "People Organized to Stop Rape of Imprisoned Persons." (2) SPR is an organization dedicated specifically to prisoner rape issues, and the instant case presents the question of the standard of protection from rape owed by prison officials to prisoners. Most of its officers, directors, and members are victims of rape behind bars, hence its collective experience with this problem is great and its internally gathered data is cumulatively conclusive. (3) SPR's president, Stephen Donaldson, is the author of the *Prisoner Rape Education*

Project[1] (an audio and written manual designed for prisoner rape avoidance and treatment of survivors, sponsored by the New York State Council of Churches), has been speaking and writing on the subject for 20 years, is a trained rape counselor[2], has lectured on prisoner sexuality at Columbia University[3], and founded and led the Committee on Male Survivors of the New York City[-sponsored] Task Force Against Sexual Assault. (4) The consents of the attorneys for the petitioner and the respondents have been requested to consent to the filing of this brief, but had not been received when we went to press.

Respectfully submitted,

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Counsel for Stop Prisoner Rape

November 14, 1993

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[1] Brandon, VT: The Safer Society Press, 1993.

[2] St. Vincent's Hospital Rape Crisis Center, New York City, 1984. He co-chaired the male counselors group.

[3] University Seminar on Homosexualities, January, 1993

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INTEREST OF AMICUS CURIÆ

Stop Frisoner Rape (hereafter SPR), a national association, founded 1979 as "People Organized To Stop Rape of Imprisoned Persons," exists to provide education, information, and advocacy on the sexual assault of prisoners (see Appendix E). The instant case gives this Court an opportunity to set a tone and provide direction to lower courts and to confinement officials on prisoner rape issues and thus is of grave concern to SPR's membership.

SUMMARY OF ARGUMENT

The rape of prisoners is a widespread phenomenon, which tends to be a repetitive problem for its victims, a deadly risk in the age of AIDS, a devastating experience whose psychological and physical consequences are known and described as Rape Trauma Syndrome. The problem of prisoner rape needs to be seen in the contexts both of violence and of sexuality. It is a practice which is ingrained in the culture of confinement, both among prisoners and prison officials. The injuries occasioned by prisoner rape are predictable and preventable using appropriate strategies.

ARGUMENT

INTRODUCTION

Little has changed since Rev. Louis Dwight first investigated sexual abuse in American prisons in 1824 to 1826, visiting "most of the prisons...between Massachusetts and Georgia" and finding "melancholy testimony to establish one general fact, viz., THAT BOYS ARE PROSTITUTED TO THE LUST OF OLD CONVICTS." [upper case in original] Rev. Dwight pleaded: "Nature and humanity cry aloud for redemption from this dreadful degradation."[4]

One hundred seventy years later, they still cry.

> "In this case we deal with a subject matter which has become a national disgrace in some of our nation's prisons. We speak, of course, of the inability or unwillingness of some prison administrators to take the necessary steps to protect their prisoners from sexual and physical assaults by other inmates."

[4] Dwight's broadside of April 25, 1826 is quoted in Jonathan Katz, ed., *Gay American History*, NY: Thomas Crowell, 1976, p. 27f.

This sad description from the Eighth Circuit's decision in *Martin v. White*, 742 F.2d 469, 470 (8CT,1984) applies to the case before the Court as well.

The rape of males has long been a taboo subject,[5] barricaded with popular misconceptions, and the phenomenon of prisoner rape [the term "homosexual rape" in the prison context is extremely misleading and should be avoided] is little discussed outside penological circles, nor is it understood despite its great importance in prison life. This brief will attempt to provide some insight into the nature of the problem.

[5] for a general discussion giving important background information, see Stephen Donaldson, "Rape of Males" in Wayne R. Dynes, ed., *Encyclopedia of Homosexuality*, New York: Garland, 1990, vol. 2, p. 1094-1098.

A. Prisoner Sexual Assault Is Widespread

Few aspects of incarceration are more horrifying than the prospect of sexual exploitation and forcible rape within jail and prison walls. It is a subject to which society reacts with a combination of fear, disgust, and denial. We don't want to believe that our criminal justice system tolerates such a cruel and unusual form of punishment. However, this is a brutal reality faced daily by inmates in crowded prisons and jails throughout the country, including bucolic Vermont....The issue of coerced sex will not simply go away. It is a fact of life for those behind bars.

—John F. Gorczyk, Commissioner of Corrections, State of Vermont[6]

Ten years ago the Eighth Circuit found in *Martin, supra*, at 472-73: "The pervasive nature of prison [sexual] assaults is well documented. Justice Blackmun summarized the findings of researchers and governmental agencies in this area as follows:

> A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison

[6] In Foreword to the *Overview/Manual for Jail/Prison Administrators and Staff* of the *Prisoner Rape Education Project*, Brandon, VT: Safer Society Press, 1993.

> vices of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system. Prison officials often are merely indifferent to serious health and safety needs of prisoners as well.

US v. Bailey, 444 US 394, 421-22 (1980; Blackmun, J., dissenting)."

The best systematic survey of sexual assault in a prison was undertaken by a sociologist, Prof. Wayne Wooden, with Jay Parker,[7] in 1979-80 in a medium-security California prison.[8] They reported that **14%** of all prisoners had been "pressured into having sex against their will" *in that prison*.[9] The authors stated "our

[7] Wooden was in the Department of Behavioral Sciences at California State Polytechnic University; Parker studied at California State University at Fullerton.

[8] Wayne Wooden and Jay Parker, *Sex Behind Bars: Sexual Exploitation in Prison*, New York: Plenum, 1982.

[9] Prisoners who had previously learned from rape in jails or other prisons to pair off with a "protector" as soon as they got to that prison were thus not counted, even though they had to engage in continuous unwanted sex.

study is likely *underreporting* certain types of sexual behavior (i.e., sexual coercion and assault)."[10]

A 1974-75 study by Daniel Lockwood of a wide sampling of New York State prisons found that **28%** of the prisoners had been targets of sexual aggression.[11] Other published studies which attempt to measure the incidence of sexual assault in prisons suffer from serious methodological problems[12] and are of little use.

It is generally accepted that the incidence rate of sexual assault in prison tends to be *highest* in *maximum security* prisons and lowest in minimum security ones.[13]

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[10] Donald Cotton and Nicholas Groth, two of the most widely known psychologists to deal with prisoner rape, observed in 1984 that "available statistics must be regarded as *very conservative at best*, since discovery and documentation of this behavior are compromised by the nature of prison conditions, inmate codes and subcultures, and staff attitudes." From "Sexual assault in correctional institutions: prevention and intervention," in *Victims of Sexual Aggression: Treatment of Children, Women and Men*, Stuart, I.R., ed., New York: Van Nostrand Reinhold.

[11] Daniel Lockwood, *Prison Sexual Violence*, New York: Elsevier, 1980.

[12] An example is Nacci and Kane's investigation of the federal prison system, where they asked prisoners whether they participated in "homosexual" activity. Since most prisoners, unlike white middle-class academics, do not consider sexual penetration of another prisoner to be "homosexual," reserving that term for the passive/penetrated role only, and themselves remain very strictly in the active/penetrative role, they would answer Nacci and Kane's questions in the negative even if they were having sex regularly.

[13] See Stephen Donaldson, "Prisons, Jails and Reformatories," in Dynes, ed., *op. cit.*, p. 1041.

Since the Court's rulings are also applied to residents of jails[14] and juvenile institutions, we call attention to the only published survey of a jail, Chief Assistant District Attorney Alan J. Davis' thorough study, assisted by the police, of the Philadelphia system in the late 1960s.[15] Davis, who also believed his study *underreported* victimization, found that **3.3%** of all males who passed through the Philadelphia jails were sexually assaulted, and that two-thirds of these assaults resulted in completed rape.[16]

No detailed survey of sexual assault in juvenile facilities has been published,[17] but there is a general consensus that victimization

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[14] For a description of the differences regarding rape between jails and prisons, see Wilbert Rideau's and Billy Sinclair's gripping inside article, "Prison: The Sexual Jungle." First published in *The Angolite*, it was reprinted in Scacco, ed. *op. cit.*, p. 17-19.

[15] Alan J. Davis, "Sexual Assault in the Philadelphia Prison System and Sheriff's Vans," *Transaction*, 6 (2), 1968, p. 8-16; reprinted in Scacco, ed., *op. cit.*, and elsewhere.

[16] These surveys remain undisputed in the scholarly and penological literature, and the amicus knows no reason to believe that time has diminished the problem.

[17] There is considerable anecdotal material, including most of Anthony Scacco's monograph, *Rape in Prison*, Springfield, Il.: Charles C. Thomas, 1975 (Scacco worked in the Connecticut juvenile system as a forensic psychologist.); Clemens Bartollas, Stuart J. Miller, and Simon Dinitz, "The 'Booty Bandit': a Social Role in a Juvenile Institution," *Journal of Homosexuality* 1:2 (1974), reprinted in Scacco, ed., *op. cit.*; and there is some data on offender and victim characteristics in Bartollas, Miller and Dinitz, "The Exploitation Matrix in a Juvenile Institution," *International Journal of Criminology and Penology*, 4:257 (1976).

rates (and the level of violence generally) are higher there than in adult institutions,[18] and that "juveniles in adult prisons appear to suffer increased danger of sexual/physical violence."[19] A recent study of six training schools which included both sexes found "almost 10% of the residents are identified as sexual victims. They are usually fourteen-or fifteen-year-olds."[20]

B. Prisoner Sexual Assault Is Repetitive For Its Victims

"Once an inmate is raped, he is marked as a victim for repeated sexual assaults for the remainder of his imprisonment." *LaMarca v. Turner*, 662 F. Supp. 647, 686 (S.D. Fla., 1987), *aff'd in part and vacated in part on other grounds*, 995 F.2d 1526 (11CT, 1993). "Anybody young, passive or feminine is going to be constantly pressured and 'hit on' and often either threatened or actual-

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[18] Bowker discusses this at some length in chapter 3 of *Prison Victimization*, NY: Elsevier, 1980.

[19] Robert W. Dumond, "The Sexual Assault of Male Inmates in Incarcerated Settings," *International Journal of the Sociology of Law*, 1992, vol. 20, p. 141. Dumond is a clinical psychologist with the Massachusetts Department of Corrections.

[20] Clemens Bartollas and Christopher M. Sieverdes, "The Sexual Victim in a Coeducational Juvenile Correctional Institution," *The Prison Journal*, spring-summer 1983, p.88.

ly physically forced or raped."[21] "Generally, those who are turned out [raped] and made into [sexual] slaves remain slaves and never can get out of that," said a noted authority on prisons, Dr. Frank L. Rundle. a former prison psychiatrist.[22] "The most serious problem associated with coerced sex in prison is the 'no-win' situation it creates for the victim, which is the primary issue that prevents inmate victims from reporting the offense."[23]

Unless the victim is immediately removed from general population and remains in isolation or segregation *for the remainder of his confinement*, he will promptly become *marked* by the other prisoners as a "*punk*"[24], and then subjected to repeated sexual aggression, virtually on a daily (or nightly) basis.[25] Segregation

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[21] Wooden and Parker, *op. cit.*

[22] Dr. Rundle, former Chief Psychiatrist of the huge Soledad prison and Director of Psychiatry for the entire New York City jail system, is quoted in Rideau and Sinclair, *op. cit.*

[23] Cotton and Groth, "Inmate Rape: Prevention and Intervention" in *Journal of Prison & Jail Health*, 2:1, (1982), p. 49.

[24] "An inmate who has been forced into a sexually submissive role" (Wooden and Parker, *op. cit.*) There are many other terms current in prisoner slang, but "punk" is most widely understood among prisoners and is also used by most scholarly writers.

See Stephen Donaldson, "Punk," in Dynes, ed., *op. cit.*, p. 1085-86.

[25] The same will be the lot of any prisoner who becomes known as "homosexual," as prisoners use the term—i.e., one willing to accept sexual penetration "on the Street."

Assaults against prisoners in "protective custody" are well documented.[26]

If a rape victim does not commit suicide[27], he finds little alternative to continual gang-rape but to "*hook up*" (form a relationship) with a strong or feared prisoner (his "*Man*"), who uses him sexually in exchange for protecting him from other prisoners.[28]

> "For a majority of these 'targets,' the best and safest coping strategy is to 'hook up' with a jocker, an inmate dominant

[26] "Protective custody" is commonly a status assigned to prisoners housed in administrative segregation units rather than in separate housing units, especially in the federal system, so that "protected" prisoners are often in fact exposed to violently aggressive prisoners awaiting disciplinary hearings; even where "protective custody" cases are kept apart from other segregation cases, those who are sexual targets are mixed with prisoners who have gone over their heads in debt, who have crossed a powerful gang, become informers, etc., and who are not inhibited from becoming sexually aggressive. Dumond notes: "Since there is no distinction by reason, many institutional protective custody units also serve as the punitive environment for inmates who have violated institutional disciplinary policy." *Op. cit.*, p. 150.

[27] Raped prisoners are at high risk of suicide according to J. R. Rowan and L. M. Hayes, *Training Curriculum on Suicide Detection and Prevention in Jails and Lockups*, Boulder, Colorado: National Institute of Corrections, 1988. We emphatically agree.

[28] Cotton and Groth, *op. cit.*, p. 50.; Davis, *op. cit.*

> enough to protect them....Bonding between two homosexuals (gay bonding) is *not* allowed within the prison culture. A homosexual or kid [punk] is expected to hook up with a 'man.' This is the unwritten law, and it is enforced....This coded obligation of the 'old man' to protect the homosexual or punk is adhered to, even to the point of violent defense."[29]

Since this type of relationship ("*protective pairing*," see Appendix C) is, from the punk's perspective, neither fully consensual (being undertaken out of extreme duress) nor violently assaultive, since the punk often has a choice of would-be "protectors" and (in relatively less violent institutions[30]) some negotiating leverage— once he has accepted the basic framework of sexual obedience—it has come to be referred to as "*survival-driven*" sexuality.[31] It is emphatically *not*, however, desired by the (usually heterosexual) victim/survivor, only endured as the least heinous option available to him, although he is usually penalized (and thus revictimized) by institutional disciplinary codes if caught at it. "Prison officials are

[29] Wooden and Parker, *op. cit.*

[30] "In maximum security prisons...the homosexuals and punks are virtually the slaves of their partners." (Wooden and Parker, *op cit.*)

[31] For a fuller description, see Appendix C.

too quick to label such activities 'consensual,'" noted Davis. (*op. cit.*)

Sexual assault is, therefore, always an ongoing issue for victims behind bars; it is never laid to rest after a single incident, since the victim must pay with unwanted sex for protection, endure repeated gang rapes, or suffer the deprivations of isolation in segregation, which over the long run (as the early history of American penology has shown)[32] can result in mental impairment and in the short run, as prison psychologist Robert Dumond notes, "further alienates and stigmatizes the inmate with both staff and inmate alike."[33]

C. AIDS Makes Prisoner Sexual Assault Deadly

Since prisoner rape is usually perpetrated by multiple rapists, and anal rape commonly involves tearing of the rectal lining and bleeding, thus affording easy transmission of the HIV virus, it follows that prisoner rape is now a deadly threat to the victim.

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[32] Adam Jay Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America*, New Haven: Yale University Press, 1992, p. 192 n 104.

[33] Robert Dumond, *op. cit.* p. 150.

> "The spread of the HIV virus into prisoner populations has turned rape from a source of psychological and emotional devastation into a life-and-death issue with resulting illnesses that create havoc for the prisoner and new difficulties for systems all over the country."[34]

Considering that rape victims tend to be the **least violent** of all prisoners (Davis, *op. cit.*; see p. 31, *infra*), the combination of rape and HIV can turn a sentence for a non-violent offense, an inability to make bail, and even a status offense for a juvenile **into a potential death penalty** decreed by no legislature and no judge. The fear of such a slow but certain death must be a terrifying spectre for all prisoners.

The deadly risk of HIV has numerous important consequences for rape victims which may not immediately be apparent to those on the outside. It makes the choice of resistance to the bitter end a

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[34] Fay Honey Knopp, in the "Introduction: A Matter of Life and Death" to the *Overview/Manual* of Donaldson, *Prisoner Rape Education Project, op. cit.* (which she edited). Knopp was until a few months ago director of The Safer Society Program and Press, a national project of the New York State Council of Churches, headquartered in Brandon, Vermont, and is now its research director. Safer Society has published numerous books, workbooks, and other materials on sexual assault issues and maintains a national referral directory for treatment programs. Knopp also has a history of nearly 40 years of prison ministry, having been until recently one of the few National Visitors of the Prison Visitation Service, an interdenominational agency accredited to the Federal Bureau of Prisons, whose institutions it services.

death-dealing one, since bloody anal rape carries a very high risk of infection, while oral sex carries little or none. Thus the target of sexual assault, faced with a hopeless situation, may save his life by compromising and "cooperating" with his assailant. This may well appear "consensual" to institutional authorities, resulting in disciplinary charges against the victim, but in actuality there is no free choice in the face of such a deadly threat.

D. Prisoner Sexual Assault Is Devastating

It is now firmly established[35] that the rape of a male produces a catastrophic and even life-threatening psychological and often physical[36] complex of injuries called Rape Trauma Syndrome (RTS).[37] (see Appendix A)

This is a type of Post-Traumatic Stress Disorder, a recognized classification of the American Psychiatric Association, and one widely known from the experiences of our Vietnam veterans.

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[35] See the articles listed in Appendix D.

[36] Bowker discusses the physical illnesses which accompany RTS in *op. cit.*, p. 16.

[37] One concise summary of RTS for prisoners is in Cotton and Groth, "Inmate Rape," *op. cit.*, p. 51-52.

"Even an instance of sexual assault that does not conclude with an actual rape can cause severe psychological problems."[38] Richard Jones and Thomas Schmid demonstrated how dramatically even reports of rapes affect new prisoners in particular.[39]

Incarcerated victims are unable to withdraw from the setting of their victimization, and indeed are constantly exposed to it anew, making it extraordinarily difficult to recover from the trauma until released.[40] Since *few institutional mental health professionals are trained to deal with RTS*, the healing process cannot even begin for most victims while they remain confined.[41] The Eleventh Circuit recently recognized that a prison's "failure to make adequate psychological counseling available to rape victims constituted cruel and unusual punishment because it constituted deliberate indifference to a serious medical need" and justified injunctive relief to

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[38] Fay Honey Knopp in the Introduction to the *Overview/Manual* to the *Prisoner Rape Education Project, op. cit.*

[39] Richard S. Jones and Thomas J. Schmid, "Inmates' Conceptions of Prison Sexual Assault," *The Prison Journal*, spring-summer 1989 issue, p. 53-61.

[40] "What is most apparent from both observing and interviewing these youngsters is how their body language indicates defeat and even humiliation." (Wooden and Parker, *op cit.*)

[41] "No matter how self-affirming a person may be, it is most difficult to stand alone in the absence of all social support." Dumond, *op. cit.*

"require special training for the staff psychiatrist and the staff psychologist, and promulgate an official referral procedure for all rape victims to the resident psychiatrist or psychologist for evaluation." (*LaMarca v. Turner*, 995 F.2d at 1534, 1544)

Even with trained counseling, RTS frequently has lifelong disruptive effects on a survivor's general functioning, self-esteem, sense of gender identity, and sense of sexual orientation. Without it, these impairments are assured. To put it bluntly, **without treatment, rape will ruin a man's life.**[42]

In the absence of general staff training which includes familiarization with RTS, the way in which staff members deal with rape victims tends to *exacerbate* the rape trauma and constitutes a *continuing* psychological injury, rubbing salt in the wound.[43] Apart from Glades Correctional Institution, which was enjoined to adopt a staff-wide training program in sexual assault issues as a result of

[42] Edward H. Peeples, Jr., and Anthony M. Scacco, Jr., "The Stress Impact Study Technique: A Method for Evaluating the Consequences of Male-on-Male Sexual Assault in Jails, Prisons, and Other Selected Single-Sex Institutions," in Scacco, ed., *op. cit.*, p. 241-278.

[43] "Unprepared, the staff member's intervention may compound rather than ameliorate the impact of the victimization." Cotton and Groth, "Inmate Rape," *op. cit.*, p. 54. For a fuller discussion see Appendix A.

LaMarca (at 1544), the amicus knows of no other confinement institution with *any* kind of training program devoted to sexual assault issues, or which includes a discussion of RTS.

E. Prisoner Sexual Assault Needs To Be Seen In Both The Contexts Of Violence And Of Sexuality

It may seem a truism that sexual assault is an act of violent assertion of power, control, and dominance, but it is easy to forget to place rape in the context of the general violence of the institution concerned. Some courts have inferred a high level of sexual assault from a high level of general violence in a particular institution.[44] This is a sound inference.[45]

Rape in the sex-starved environment of the all-male institution, where few will voluntarily accept a submissive/penetrated role, is also—and here there is a *distinction to be drawn from rape in the*

[44] Most explicitly the district court in *LaMarca*, 662 F.Supp at 678, and the Third Circuit in *Young v. Quinlan*, 960 F.2d 351, 363 (CT3, 1992)

[45] "Inmate sexual assault is a serious problem that constitutes a major undercurrent in incidents of institutional violence." Cotton and Groth, "Inmate Rape," *op.cit.*

community—distinctly colored by sexual deprivation.[46] Since almost all prisoner rapists are **heterosexual** in identity and practice *outside* of confinement,[47] and they regard their victims as substitutes for unavailable females, they tend to target those who, in their eyes, can plausibly be assigned feminine characteristics: the beardless smooth-skinned youth; the small; the passive or "weak;" the non-fighter;[48] and especially the homosexual.[49] Noted Wooden and Parker: "In prison there is an institutionalized social pressure, both overt and covert, toward feminizing homosexuals and the kids [punks]." (*op. cit.*)

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[46] Donald Tucker, who experienced prisoner sexuality as a rape victim and punk, is most emphatic on this point, bitterly criticizing "armchair theorists" who deny its importance without ever having lived behind bars, in "A Punk's Song: View From the Inside," in Scacco, ed. (*op. cit.*)

[47] Thus the practice of some writers of referring to "homosexual rape" or to prison rapists as "aggressive homosexuals" is uninformed and very misleading and should be abandoned. In context, it is quite clear simply to refer to "rape" and to "sexually aggressive prisoners."

[48] See e.g., *Butler v. Dowd*, 979 F.2d 661, 667, 675 (8CT, 1993)(*en banc)* (younger, smaller, naive, and passive); *Redman v. County of San Diego*, 942 F.2d. 1435, 1448 (9CT, 1991)(*en banc*) (young prisoner), *cert. denied*, 112 S.Ct. 972 (1992); *Martin v. White* 742 F.2d 469, 475 n. 6 (8 CT, 1984)(new admissions to prison); *Withers v. Levine* 615 F.2d 158, 161 (4CT, 1980)(younger prisoners), *cert. denied* 449 US 849 (1980); *Jensen v. Gunter* 807 F. Supp. 1463, 1482-83 (D.Neb. 1992), *appeal dismissed* 992 F.2d 183 (8CT, 1993).

[49] Bowker discusses this tendency to "redefine their victims as females, and even refer to them as 'girls'" at greater length in *op cit.*, p. 11. This may explain why the old, ugly, and obese are less likely to be targeted for rape.

F. Sexual Assault Is A Fundamental Part Of The Culture of Confinement And Is Seldom Reported

Prisoner rape is not just a psychological phenomenon, an abuse of power by disturbed individuals who react to their loss of personal power during confinement by seeking to exert it over one of their fellows. It is also a sociological phenomenon, a custom which has become an institutionalized part of life behind bars and as such is tacitly accepted, if not endorsed, by most prisoners and administrators. Therefore few prisoners take steps to counter it[50] unless their personal or group safety is at stake, and prison administrators are also reluctant to challenge this social structure.

"The issue, categorically, is not homosexuality but heterosexual brutality," wrote the late Dr. Anthony Scacco, Jr., a forensic psy

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[50] There are exceptions: Stop Prisoner Rape was founded by Russell D. Smith, a married prisoner, and today includes among its incarcerated members a substantial number who have never been raped and are not themselves at risk, but who speak out against rape in their institutions and try to help newcomers avoid it. Smith's vision was that eventually enough prisoners would be persuaded to oppose rape that they would be able to protect targets and make the custom of rape socially unacceptable even behind bars.

chologist in the Connecticut juvenile confinement system who pioneered the study of prisoner rape, in the preface to his anthology, *Male Rape* (*op. cit.*). Confinement institutions are full of young males who do not check in their sexual drives at the jailhouse door; the customary sexual activity for these males is penile penetration, by which most of them define their "*manhood*;" and there are relatively few actual homosexuals willing to assume the passive (and assigned "feminine") penetrated role.

"The rapists are usually heterosexual; many have wives and children. In almost all cases, the victims also are heterosexual." Thus reported Loretta Tofani in her Pulitzer-Prize-winning series, "Rape In the County Jail: Prince George's Hidden Horror," in *The Washington Post*, September 26-28, 1982. The result is an enormous imbalance of demand for, and supply of, willing passive sexual partners, on the order of 100 to 1.[51] Outside observers can barely imagine the social consequences of this situation.

[51] For a typical prison; in a jail serving a city with a large gay population the ratio may come down as "low" as 20:1.

The immediate result is enormous pressure to "turn out" unwilling males to fill the demand for passive "partners."[52] The chief means by which this is done is rape and the convincing threat of rape. This produces a secondary effect: the status of "manhood" is in perpetual jeopardy, with aggressive, sexually deprived men looking to exploit any weakness in order to turn out, and hopefully acquire for their own use, a new punk. This is a major force driving the pervasive atmosphere of competitive violence which permeates jails, prisons, and juvenile institutions (sometimes referred to as "gladiator schools").

A great deal of the violence in confinement is related to sexual aggression and sexually expressed dominance struggles. (Bowker, *op. cit.*, p. 15-16) As many have observed, violent combat to "prove your manhood"[53] is a routine part of a new prisoner's in-

[52] This "turning out" process is described in detail in Nobuhle R. Chonco, "Sexual Assaults Among Male Inmates: A Descriptive Study," *The Prison Journal*, spring-summer 1989, p. 72-82, and in Bowker, *op. cit.*, p. 14-15.

[53] "'In jail manhood is everything because you have nothing else.'" Former prisoner Dwight Welcher, quoted in Tofani, *op. cit.*

introduction to most male facilities.[54] Few of these fights are reported to staff, and when they are, their sexual underpinnings are usually hidden (Tofani, *op. cit.*). Therefore any efforts to weaken the acceptability of the custom of rape will also go a long way to minimize the general level of violence. Far from conflicting with security needs and penological goals, any reasonable measures to combat sexual violence will reinforce order and security generally.

One of the key findings of Davis' study (*op. cit.*) which is critical to understanding prisoner rape, and which he explained in some detail, is that **only 3.2 % of the sexual assaults his investigators**

[54] "The fear of rape encourages many inmates to arm themselves with 'shanks,' knives they make....It also encourages many inmates to behave more violently in jail than they normally would, even raping others so that they will not be raped, according to some inmates. Eventually, these people get out of jail, with a lot of experience in behaving violently." Tofani, *op. cit.*

uncovered were ever mentioned in official jail records.[55] "Prison officials know this," wrote David Rothenberg, then executive director of The Fortune Society, a large social service organization for newly released prisoners in New York, "yet they continue to offer low statistics on prison rape" based on their official reports.[56]

One reason for this lack of reporting is the reluctance of prisoners to be identified as informers. "If he reports the victimization to the authorities, he acquires the label of a 'snitch' or informer and places his life in jeopardy. This 'jacket' will follow him while he remains in the correctional system and will expose him to fur-

[55] Tom Cahill, now executive director of Stop Prisoner Rape, estimated in his column in the *Bay Area Reporter*, August 8, 1985, that "one in a hundred" males raped in confinement report their abuse. Cahill succeeded Russell Smith as head of SPR in 1983 and served as such until 1988, when Donaldson became president and he assumed his current duties.

Tofani reported in the *Post* that despite an official figure of less than 10 rapes a year among male prisoners, on-the-record interviews with 10 guards, 60 prisoners, and one jail medical staffer established that there were "approximately a dozen incidents a week in the Prince George's County Detention Center....Even when rape victims tell guards or medical technicians that they were raped or sexually assaulted, the jail does not consider their cases 'reported' unless the victim presses charges or unless there is clear medical evidence, according to jail spokesman Jim O'Neill." (*op. cit.*)

[56] Rothenberg article in *The New York Times*, Jan. 22, 1977.

ther abuse and harm."[57] As one jailhouse rapist, Francis Harper, told Tofani (*op. cit.*): "Prisoners see that the guards don't help so they don't play by the institution rules. They play by the inmate rules, it's safer." Since a reputation as an informer can easily lead to death or serious injury,[58] the Court must not ignore the fact that **survival needs, real and perceived, may make it virtually impossible for most prisoners to give notice—especially specific notice with names and circumstances—of sexual threats and harassments to officials**.

Another powerful factor is the extreme *humiliation* which most male rape victims perceive as attendant upon their supposed "loss of manhood," and the common (though erroneous) *imputation of homosexuality* to them, both of which factors motivate them to attempt to **conceal their victimization** from family, friends, and authority figures (including guards and judges).

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[57] Cotton and Groth, "Inmate Rape," *op. cit.*, p. 50.

[58] "In the aftermath of victimization, inmates adhere to the code of silence. It is therefore very common to find the victimized inmates not reporting their victimization. Witnesses do not volunteer to give information to the correctional staff for fear of endangering their lives. Snitches, as they are called, are not tolerated by other inmates." Chonco, *op cit.*, p. 77.

Accordingly there is a need for confinement officials to take preventive measures without first requiring prisoners to give specific notice of the danger that threatens them.[59]

G. Prisoner Sexual Assault Is Institutionalized Among Staff As Well

The institutionalization of prisoner rape commonly extends to the rank-and-file guards[60] (see *LaMarca* at 1537) and all too often to the ranks above.[61] Rape is often simply ignored by officials, who consider it a public-relations embarassment and an indication that they are not in full control of their institutions.[62]

The usual attitude of wardens and sheriffs, as with lower-level staff, towards pervasive rape is to look away. That is why the

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[59] Few rape victims are given such specific advance notice by their assailants; how then could they convey knowledge of such impending harm to officials, even if they could overcome the fear of being branded an informer and the humiliation of acknowledging oneself as a sexually vulnerable male?

[60] "Even when a victim screams for help, guards often do not respond until it is too late." Toffani, *op. cit.*

[61] For a fuller discussion of this phenomenon as it appears in juvenile institutions, see "Staff Exploitation of Inmates: The Paradox of Institutional Control" by Clemens Bartolis, Stuart J. Miller, and Simon Dinitz, in *Victimology: A New Focus*, I. Drapkin and E. Viano, eds., Lexington, MA: Lexington Books, 1974; reprinted in Scacco, ed., *op. cit.*, p. 187-197.

[62] Davis, *op. cit.*

state and federal systems are generally characterized by the absence of staff training, no orientation to the danger for incoming prisoners, no follow-up care for victims, and usually no standard procedures for investigation of sexual assaults or collection of evidence.

Of those sexual assaults which *are* reported, a vanishingly small number are ever referred to prosecutors, much less brought to trial.[63] Davis (*op. cit.*) also reported that guards commonly pressured victims not to complain or prosecute. A lack of success at criminal prosecutions, or even a low rate of indictment, might be accounted for by the reluctance of victims to testify. But the lack of referral to prosecutors of documented cases, as well as the nearly universal failure to warn new prisoners about the dangers of sexual assault during orientation or to train employees in rape

[63] "The victims normally do not press charges against their attackers. Even in cases where rape victims say they wanted to, they say guards or police discouraged them from doing so. As a result, the rapists rarely are punished." Tofani, *op. cit.*

See for example the Eighth Circuit's discovery in *Butler* v. *Dowd*, 979 F.2d 661, 675 (1992) that despite evidence of "at least 100 sexual assaults reported...there were almost no sexual assaults assigned to the prison investigator for investigation, and Dowd never referred even one sexual assault for prosecution."

issues, can only be explained by the **institutionalization of sexual assault even among the custodians.**[64]

Bowker devoted all of chapter 7 (*op. cit.*) to the direct involvement of staff members in setting up, watching, deliberately avoiding witnessing, and profiting financially from the rape of prisoners. Davis also noted "repeated instances where homosexual 'security' cells were left unguarded by a staff that was too small or too indifferent, or who turned their backs so that certain favored inmates could have sexual relations." (*op cit.*) Ex-prisoners attest that sexual assault is commonly used as a management tool by administrators.[65]

[64] The lack of disclosure of rapes, Dumond comments, "is, as noted by many researchers, supported by the institutional environment and staff who often 'penalize' inmate victims when they come forward with such complaints." *Op. cit.*, p. 151.

[65] Jerry Sousa, then teaching a course on prison life at the University of Massachusetts, told Ted Koppel: "It's generally ignored, sometimes directed by the prison administration. It's a means to strip a prisoner of his dignity or manhood if you will....I've seen prisons where this was tolerated, where rapists who had been known to have raped prisoners, who had physically abused and hurt prisoners very brutally during rapes, were kept in charge of new ~~man's~~ blocks —and because they were informers, and that was their reward....Prison administrators condone rape for various reasons:.....this is a dividing element that many administrators utilize to keep prisoners fighting with one another..." (ABC News, "Nightline" November 10, 1982, transcript.)

See also Donaldson, "Prisons, Jails and Reformatories," *op. cit.*, p. 1045.

Donald Tucker, who wrote the only published account of prison life by an admitted punk in "A Punk's Song: View From the Inside" (*op. cit.*) summarized: "Officials use it [rape] to divert prison aggression, destroy potential leaders, and intimidate prisoners into becoming informers (as before the [1980] New Mexico prison riot)."

H. The Risk Of Sexual Assault Is Predictable

Prisoner rape is far from random (Bowker, *op. cit.*). Demographic risk factors have been well reported in penological literature since at least 1982, and known informally to keepers long before then. Certain characteristics are demonstrably singled out for attention by prisoner rapists.

Youth is very well known as one of them. Davis reported that the average age of jail rape victims was 21, contrasting with an average prisoner age of 28. Wooden and Parker reported the average age of heterosexual prisoner-victims at 23, compared with an overall average of 29 in the prison he studied.

Small size is equally well known. Davis reported an average weight of 141 lbs. in his victims and 157 lbs. in known aggressors, with a ¾-inch height differential. Lockwood (*op. cit.*) agreed, noting that targets weighed an average of 15 lbs. less than aggressors.

Race has been very widely discussed in the literature,[66] with whichever racial group has the least clout in the institution's prisoner power structure being most often victimized. Interracial rape constituted 56% of Davis' incidents. Lockwood found a 250% differential between racial groups.[67] Wooden and Parker (*op. cit.*) broke their heterosexual victimization figures down into three racial/ethnic groups, with no heterosexual victims in one group, 4% in the second group, and 17% in the remaining group.

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[66] See Peter Buffum, "Racial factors in Prison Homosexuality;" Anthony Scacco, "The Scapegoat is Almost Always White;" and the Davis study, all reprinted in Scacco, ed., *op. cit.*; Bowker, *op. cit.*, p. 8-10; and additional citations in Dumond, *op. cit.*, p. 141.

[67] This was for the New York State survey of six prisons. Lockwood reported that in Coxsackie, a New York State youth prison, 71% of the white youths had been targets of sexual aggression; he did not report data for other racial groups at Coxsackie separately. (*op cit.*)

Sexual orientation was documented as a factor by Wooden and Parker (*op. cit.*), who found that while most prisoner rape victims are heterosexual, homosexuals were over four times as likely to be victimized.

Seriousness of offense was studied by Davis (*op. cit.*), who found that only 38% of the victims were charged with serious felonies, contrasted with 68% of the rapists.[68]

New prisoners[69] and **first-offenders**[70] were recognized as particularly vulnerable by the district court in *Van Horn* v. *Lukhard*, 392 F.Supp 384, 387 (E.D. Va., 1975), a perception endorsed by many observers.[71]

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[68] One well-known exception is child sexual abuse, which is commonly rationalized as "justifying" rape of the accused or convicted child molester.

[69] S. Lerner reported in "Rule of the Cruel", *Corrections*, v.3 (1987, first published elsewhere in 1984) that a guard reported to a state legislator in Florida that a young inmate's chances of avoiding rape were "almost zero....He'll get raped within the first twenty-four to forty-eight hours. That's almost standard."

[70] First offenders were noted as vulnerable by Cotton and Groth, "Inmate Rape," *op. cit.*, p. 53.

[71] "Virtually every slightly-built young man committed by the courts is sexually approached within a day or two after his admission to prison. Many of these young men are repeatedly raped by gangs of inmates....Only the tougher and more hardened young men...escape...rape." Davis, *op. cit.*

Other factors which increase the likelihood of targeting are: **non-violent offenders** (Davis, *op. cit.*), **middle-class,**[72] **not gang-affiliated, without significant personal combat experience, not "streetwise."**[73]

The more of these characteristics a particular prisoner possesses, the more likely he is to be victimized, which should raise the level of concern by administrators for his safety.

Readily available facts about any prisoner, plus a few questions, **enable administrators to classify incoming prisoners as to vulnerability as a target**, and treat them accordingly.[74]

The federal prison system already uses several sets of guidelines to classify prisoners (for various purposes) which assign point values to different factors and use the sum to indicate the appropriate classification category.

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[72] Cotton and Groth, "Inmate Rape," *op. cit.*

[73] J. Irwin described victims being vulnerable because they are not "'street-wise': they don't know the street language, roles and games and don't know how to protect themselves." *The Felon*, Englewood Cliffs, NJ: Prentice Hall, 1970.

[74] "One [prevention] strategy is to identify the profile characteristics of victims and offenders and to segregate these groups as much as the physical plant and resources will allow....The potential victim is typically vulnerable by age, size, body build, culture and life style." Cotton and Groth, "Inmate Rape," *op. cit.*, p. 53.

This predictability of risk is relevant, given the widespread knowledge among confinement officials of these facts, to liability inquiries concerning prisoners who should have stood out as targets[75] in the mind of any competent professional.

Those who are most at risk know they are *perpetually at risk*, that rape lurks in showers, toilets, cells, television rooms, libraries, laundry rooms, work sites, stairwells, wherever guards are not watching. **And they know that any experienced prison official knows it as well as they do.**

Cotton and Groth also described a profile of the typical *assailant* as "experienced in institutional life, has done time before, has a history of institutional violence (sometimes clearly including prior sexual attacks), and has a need to establish or defend a reputation."[76]

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[75] "who had 'notice' written all over them" to use a phrase from Bill Gibney, managing attorney, Prisoners Legal Services of New York

[76] "Inmate Rape," *op. cit.*, p. 53.

I. Sexual Assault Is Preventable

The amicus, Stop Prisoner Rape, is convinced that most sexual assaults in confinement **are** preventable, and that administrative actions and policies can and do make a significant difference.[77] (See Appendix B)

We suggest that the following practices (none of them particularly expensive) **contribute to ending or minimizing rape and its damage** to the prisoner-victim:

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[77] Rideau and Sinclair described how a change of administrative policy towards sexual violence made a dramatic difference in Angola prison, *op. cit.*, p. 20-21. See *Redman v. County of San Diego*, 942 F.2d 1435, 1445-47 (CT9, 1991) *en banc*, *cert denied* 112 S.Ct. 972 (1992) and *Berry v. City of Muskogee* 900 F.2d 1489, 1496 (CT10, 1990).

(1) realistic **orientation** programs to warn new prisoners;[78] it was for this purpose that The Safer Society Project in 1993 developed its 27-minute audio tape "I: An Ounce of Prevention," which has already been put to use in the Vermont prison system[79] and been ordered by scores of institutions from coast to coast. It is the *new prisoner*, not the Warden, who requires specific notice!

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[78] "By training and orienting inmates, providing adequate notice and a mechanism to report such events, as well as an introduction to the prison 'culture' (such as 'do not accept favor or gifts, as there is usually a price') inmates who may be unfamiliar with the prison ethos may be more prepared to fend off such violence." Dumond, *op. cit.*, p. 149

"Upon admission to a correctional facility the inmate should be advised and counseled in regard to the risk of sexual victimization, how he can help reduce this risk, and how he can receive help if he is sexually hassled, exploited, or attacked." Cotton and Groth, "Inmate Rape," *op. cit.*, p. 56

"New inmates should be taught about a set-up during orientation." Chonco, *op. cit.*, p. 80.

"Perhaps the most useful small step would be to *prepare* honestly *the incoming first-timer* for what he is going to face....Tell the guys how to avoid rape, prepare them to fight back, and perhaps most importantly, prepare them as well as can be done for the possibility that they may be sexually penetrated, despite all, emphasizing that this does not mean the end of the world or of their heterosexuality, etc." Tucker, *op. cit.*, p. 77

[79] As part of the *Prisoner Rape Education Project* (*op. cit.*), with the endorsement of Corrections Commissioner Gorczyk and the New York State Council of Churches.

(2) institution-wide **staff training** on rape issues;[80]

(3) mandatory **reporting** to top prison officials of sexual assaults which become known to guards and other staff, and prosecutorial-referral policies in cases where victims are willing to testify;[81]

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[80] "In prevention, a key emphasis has to be on providing a vehicle for staff awareness and responsiveness of the problem....One of the ways to ensure prevention is to give officers and prison staff a greater understanding of the outcomes of sexual assault, in particular its relationship to inmate violence and assault on staff." Dumond, *op cit.*, p. 148

"If staff are not adequately trained to recognize and address this issue they are caught off-guard and unprepared to handle such incidents when they occur....Without accurate information on sexual assault within their institution, correctional staff are at a serious disadvantage to remedy this problem." Cotton and Groth, "Inmate Rape", *op. cit.*, p. 48

"Creating pro-active policies and trainings that build awareness within your institution that sexual assault will not be tolerated is a critical part of controlling jail and prison rape." Knopp, *op. cit.*

[81] "Prosecution and conviction are important strategies to combat inmate rape....The prosecution of such cases makes a clear statement to inmates that coercive sex is not acceptable and will not be tolerated even within correctional institutions." Cotton and Groth, "Inmate Rape," *op. cit.*, p. 57.

(4) **classification** of all prisoners by rape risk factors and known histories and appropriate placement, both within an institution[82] and among a jurisdiction's facilities;[83]

(5) **sympathetic treatment** of rape victims, including trained counseling[84] and serious consideration of housing change requests;[85] it was to begin to fill the gap in counseling that The Safer Society Project developed its 90-minute audio tape "II: Becoming a Survivor" as part of the *Prisoner Rape Education Project* (*op. cit.*).

(6) establishment of **protocols** for rape intervention and investigation and for medical and psychiatric follow-up,[86] such as the one in force at the San Francisco county jail,[87] see also *LaMarca* at 1544;

(7) reduction of prisoner **idleness** (no work or school assignment).

The amicus further suggests that the following practices (most of which can be changed without great expense) tend to **increase the rate of sexual victimization and damage** to the prisoner-victim:

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[82] "In institutions with more than 500 inmates, classification of inmates should be very tight, suggesting that inmates with prior violent offenses should be segregated from nonviolent inmates or inmates who are vulnerable to victimization." Chonco, *op. cit.*, p. 80.

"Certainly, too, identifying 'at risk' inmates, housing inmates with compatible typologies and swift classification/placement for victims of such assaults are critical ingredients of managing the potential difficulties of such events." Dumond, *op.cit.*, p. 149.

See *Jones* v. *Diamond*, 636 F.2d 1364, 1374 (CT5, 1981); *Dowd* at 675; and *Vosburg v. Solem*, 845 F2d 763, 766 (8CT, 1988).

[83] "If prisoners with certain characteristics have a notably high risk of suffering sexual assaults, then there is no reason why these prisoners cannot be identified at the point of entry into a correctional system. These men could then be placed in institutions that do not include potential rapists and that are more intensively supervised than other correctional institutions. When we realize this, we see that *the policies followed by state correctional administrators must also be considered to be causal factors in producing prison rapes*. These systemwide administrators are generally unwilling to spend the time and effort as well as the money necessary to protect easily victimized prisoners." Bowker, *op. cit.* [emphasis added]

[84] "Not only prisons but jails must be provided with effective psychologists and psychiatrists trained to deal with the trauma of rape and other forms of sexual coercion, and these must advertise their availability and their independence from the administration, which must be real." Tucker, *op. cit.*, p. 77.

[85] This is particularly important since most prisoner rapes are repeated incidents rather than initial ones.

[86] "Once a sexual assault protocol has been established and staff trained to dispell the myths and misconceptions about male rape, the problem can be addressed more rationally." Cotton and Groth, "Inmate Rape," *op. cit.*, p. 54. The authors go on to discuss the needs such a protocol should address. Cotton (see next Note) brought considerable experience to this assessment.

"Establishing a clear protocol for meeting the medical, psychological, legal, social and protective needs of the inmate victim in a timely manner is vital to maintaining the safety and security of each correctional institution." Dumond, *op. cit.*, p. 150.

[87] Drawn up by Donald Cotton, adopted in 1978 and revised in 1981; printed in the *Overview/Manual* of the *Prisoner Rape Education Project (op. cit.)*, as Appendix F, and in *The Journal of Prison and Jail Health*, 1982, vol. 2. No comparably complete protocol is known to exist in any other confinement system, though New York City's jail system has a more sketchy one.

(1) "protective custody" facilities which penalize their residents,[88] fail to protect them, and are commonly indistinguishable *de facto* from punitive disciplinary quarters;[89]

(2) staff mislabelling of heterosexual "punks" as "homosexuals," which exacerbates the trauma and promotes suicidal behavior;

[88] "Inmates who complain [of sexual assault] are themselves punished by the prison system....This means that after a complaint is made, and especially if it is pressed, the complainant is locked in his cell all day, fed in his cell, and not permitted recreation, television, or exercise.... Many victims consider this 'solitary confinement' worse than a homosexual relationship with one aggressor." Davis, *op. cit.*

[89] Dr. Rundle: "protective custody is punitive, as well as punitive segregation, as it's usually in the same place with the same kinds of restrictions." Quoted in Rideau and Sinclair, *op. cit.*, p. 21. The two Angola Prison authors continue: "It's usually a locked-down situation, a condition of existence which forces the weaker inmate to eventually reach a point where he decides that it's better to permit himself to be sexually exploited and enjoy a certain amount of freedom rather than the mental and physical anguish of solitary confinement where he stands a good chance of losing his sanity. The punitive and painful nature of 'protection' is one of the major influencing factors in the decision of victims of sexual violence to go on and accept the role of a female rather than report the victimization to the authorities and request protection." See also p. 22-23, *idem*

"No attempt was made to distinguish between the men in the Hole for punishment and those in the Hole for 'protection'; both are denied reading material, full meals, exercise, etc....I was put in a special section of four-man cells reserved for those needing protection and those taken out of population for starting fights. The fighters, of course, soon 'took' the 'protected' non-fighters." Tucker, *op. cit.*

(3) staff discrimination against homosexuals;[90]

(4) staff stigmatization of rape victims and, given the frequent combination of the two preceding conditions, overt discrimination against rape survivors;

(5) failure to provide and protect confidentiality of communications between rape victims and staff members (especially mental health, medical and chaplaincy staff) and of medical and other records of victimization;

(6) ignoring the problem—as Donald Tucker told a hearing of the District of Columbia City Council,

> It is stated that the crime of rape has thrived on, above all, silence. This is nowhere as true or as painfully obvious as in the case of rape of men in our prison system. Everyone who has been involved with 'corrections' for any length of time knows that rape is a constant feature, indeed an institution, in the prison system. And yet no one speaks of it.[91]

[90] "Pro-active policies are likely to fail, however, if they are undermined by homophobic myths and attitudes held by the implementing staff. Such widesrepad counterproductive and injurious myths around the subject of male rape require eradication through a thorough staff training program." Knopp, *op. cit.*

"Gay prisoners are the only prisoners in Angola who are locked up because of what they are rather than what they do, and the practice of arbitrarily locking them up raises the question of 'discrimination.'" Rideau and Sinclair, *op. cit.*, p. 25

[91] September 18, 1973, quoted in Donald Tucker, "The Account of the White House Seven" in Scacco, ed., *op. cit.*, p. 42.

(7) open and poorly supervised dormitories;[92]

(8) the practice of imposing disciplinary penalties for fighting in self-defense, the only way sexual pressure can usually be countered (see Appendix B);

(9) policies and practices which do not maintain as wide a gulf as possible between sexual assault, on the one hand, and non-violent sexuality on the other;[93]

(10) administrative action against protective pairing (see Appendix C), a prisoner custom which *does effectively minimize* further violence against rape survivors—penalizing these pairings and breaking them up merely exposes the survivor to more gang assaults;[94]

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[92] see Lockwood, *op. cit.*, who compared the dormitories in New York to the notorious dormitories in Philadelphia and Arkansas.

[93] "When the combination of easy [rape] victims and administrative pressure against pair-bonding arises, as it often does, it becomes less risky to commit rapes than to commit oneself to an ongoing consensual relationship." Donaldson in "Prisons, Jails and Reformatories," in Dynes, ed.,*op. cit.*, p. 1041. For more discussion, see Appendix B.

[94] SPR has concluded that disciplinary sanctions against non-violent sexuality among prisoners in fact strongly contribute to the incidence of rape and are subject to constitutional attack in those jurisdictions, the majority of American states, which do not criminalize such behavior for their citizens outside confinement, since they are penologically counterproductive.

(11) involuntary segregation of homosexuals, which simply increases the pressure to "turn out" the remaining "virgin" heterosexuals.[95]

During the past decade, our society has moved the threshold of acceptable behavior with respect to sexual abuse in such areas as spousal rape, date rape, gender-neutral rape legislation, and child molestation. Prisoner rape is most akin to sexual abuse of children in that we have always disapproved of it, but have only recently come to recognize the extent of it, and we as a nation are beginning to face these problems directly. If confinement administrators are to make a serious effort to bring to the prison, jail and reform school setting some measure of America's modern sensibilities to

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[95] Rideau and Sinclair, *op. cit.*, p. 20, 25

Tucker: "In many institutions, queens are immediately segregated from the general population, thus increasing the pressure on the punks who remain." (*op. cit.*, p. 66) He points out on p. 76 that this practice merely results in another heterosexual losing his anal virginity. Certainly that is an incomparably greater disaster than allowing a true homosexual who can handle himself in population and does not wish to lose access to programs and services available to the general population to remain there.

sexual abuse, a systematic effort involving all aspects of institutional life will be required.[96]

Sole reliance on "protective custody" (which Dumond aptly observed "may further victimize inmate victims,"[97]) and internal disciplinary procedures (even coupled with prosecution in court)[98] does not constitute a *solution* to the problem of prisoner rape.

Indeed, the failure on the part of confinement officials to adopt proactive policies designed to minimize prisoner rape may give rise to grave constitutional concerns. District Attorney Davis, a prosecutor, made no bones about it:

> "The sexual system...imposes a punishment that is not, and could not be, included in the sentence of the court. Indeed, it is a system under which the least hardened criminals, and many men later found to be innocent, suffer the most." (*op. cit.*)

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[96] "In the last 20 years there has been attention to systematically identifying [prisoner rape] and to suggesting changes in both clinical intervention strategies as well as prison management policies. Despite these efforts, much misunderstanding, under-reporting, continued victimization and mismanagement within prison institutions continues." Dumond, *op. cit.*

[97] Dumond, *op. cit.*, p. 150.

[98] Lockwood noted the difficulties in the disciplinary approach, largely due to the penalties and humiliation inflicted on the victim who testifies.

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CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for trial on the merits with the widest possible scope for demonstrating "deliberate indifference" to the jury. The opinion of the Court should emphatically convey the gravity with which it views sexual assault in confinement, encourage officials to take positive steps to deal with the problem systematically, and hold the door to the courts open for those so utterly devastated.

Then Rev. Dwight's ghost may finally rest in peace.

Respectfully submitted,

Frank Dunbaugh,
Counsel for Stop Prisoner Rape

November 14, 1993

APPENDIX

EXCERPTS FROM THE *OVERVIEW/MANUAL* OF THE PRISONER RAPE EDUCATION PROJECT

by Stephen Donaldson, edited by Fay Honey Knopp, with a Foreword by John F. Gorczyk, Commissioner of Corrections of the State of Vermont, published August 1993 by The Safer Society Press, Brandon: Vermont, under the sponsorship of the New York State Council of Churches, with a grant from the Aaron Diamond Foundation. These texts were written for staff and administrators.

A. Rape Trauma Syndrome (RTS): What Everyone Should Know

Rape Trauma Syndrome or RTS is a devastating form of post-traumatic stress disorder (PTSD, familiar to many mili-

tary combat veterans) which has been recognized and described only in the past two decades. In some form and degree it affects virtually all victims of sexual assault, including ones who avoided a completed rape. Even verbal sexual aggression without physical coercion—a common experience for prisoners—can leave the target psychologically damaged. For male survivors of an actual rape the disorder is likely to be severe and even life-threatening. Institutions should brook no delays in getting new rape victims into counseling within hours of the victimization; this is a true psychiatric emergency. The physical consequences which often accompany RTS are noted on p. [not included].

RTS was first discerned and described in connection with female victims. Males experience the same problems, but in addition must deal with a number of serious issues specific to their gender which add greatly to the traumatization. Male victims who remain incarcerated and are thus unable to withdraw from the setting of their victimization are seriously handicapped in attempting to recover from the trauma.

Those who are exposed to repeated victimization and must even adapt on a daily basis to being a perpetual and continual victim of unwanted sexual penetration, and who must undertake numerous daily compromises in order to avoid the most catastrophic situations (a description which unfortunately comes to characterize most incarcerated rape survivors), must endure the most extreme form of the syndrome. The literature on therapy, written for male survivors in the community, does not yet take these sharply intensifying factors affecting prisoners into account.

Anyone likely to be in a therapeutic or counseling relationship with a rape survivor should become familiar with the psychological and medical literature noted in the Bibliography (App. D). Other staff members, however, also have to deal with rape survivors and should have at least a basic familiarity with RTS in order to avoid unwittingly contributing to the further victimization of the survivor.

This begins with an understanding of the nature of the worst psychological injuries suffered, since it is in these hy-

persensitive areas that the survivor is most vulnerable to additional, albeit unintentional, traumatization caused by others who deal with him after the physical assault.

First there is the total loss of control over even the insides of one's own body, resulting in feelings of utter vulnerability and powerlessness. This makes control and power key psychological issues for all rape survivors. In the case of men, who are brought up to expect internal inviolability, are expected to be able to defend themselves against attack, and are socialized to consider total helplessness incompatible with masculinity and thus intolerable, these issues are hightened. In the setting of imprisonment, the very environment, with its all-pervasive theme of control by the state, continually exacerbates this wound. Whenever decisions are made *for* the survivor, rather than *by* him, this has the effect of rubbing more salt into the open wound. Therefore persons in positions of authority should *wherever possible* allow the survivor to make his own choices, even if the alternative options presented are unacceptable, in order to help him combat the

feeling of total helplessness which will, if left intact, defeat all attempts to improve his condition. Often this is a question of style rather than substance, but in psychological matters it is the impression which counts. However, when conflicts arise over confidentiality, participation in prosecution or informing, housing placement, etc., staff members should keep in mind that every action taken which the victim perceives as one of peremptory control will in fact aggravate the trauma and thus, from the survivor's perspective, further victimizes him.

Second, there is the perception that the victim's sexual identity as a male has been compromised or even demolished and reversed. All but those homosexuals who identify themselves as feminine are gravely affected by this perception. It results from very widespread attitudes relating to sexual penetration and defeat in personal combat (sexuality and aggression being the two primary remaining sources of male identity to most prisoners), and it is exacerbated by the daily behavior of other prisoners who are aware of the victimiza-

tion and lose no opportunity to remind the survivor of his supposed "loss of manhood." If allowed to go unaddressed, this belief will frequently lead to suicide attempts, other self-damaging behavior, or violently aggressive compensatory behavior. It is absolutely imperative, therefore, that staff persons refrain from implying any slight to the victim's masculinity. To the contrary, all persons in contact with the survivor should go out of their way to emphasize his male status verbally and through body language at every opportunity.

The third major injury, for heterosexual survivors, is often related to manhood issues, and results from peers who spread the unfounded belief that the victim's sexual orientation is compromised or even transformed by his involuntary experience. This perception, if not countered, can also produce suicidal behavior. Unfortunately, staff people frequently contribute to this belief by failing to distinguish between homosexuals and heterosexuals who have been pressured into passive sexual activity or roles. Only careful staff training with regard to the realities of prisoner sexuality can work to counter this deplorable tendency. Even in cases where prisoners label themselves as "homosexual," staff should be careful to ascertain that this identity existed prior to confinement before reinforcing it by repeating the label; an unsophisticated prisoner may simply be repeating what others, seeking to justify his sexual subordination, have told him, or may be using it as a temporary condition rather than a basic trait. Ultimately one must question whether there is any rationale for making official distinctions of sexual orientation in the environment of same-sex confinement, where sexual behavior both active and passive so commonly involves those who behave heterosexually both before and after confinement. Most specifically, staff members should avoid any implication that a rape survivor would have any less interest in the opposite sex.

Suicidal impulses are so common among males who have recently experienced their first or second rape that any such

victim should be presumed suicidal until a mental health professional determines that this is not the case.

RTS has been observed to proceed in most victims in a series of stages, though they are not universal. The description which follows applies to the untreated survivor; those victims who are given effective psychotherapy or counseling, or even merely exposed to Tape II, may avoid the worst aspects of RTS or be better able to control their actions and feelings.

At first the new victim, especially when removed from the site of the attack, tends to be numb, withdrawn, talks slowly or inaudibly if at all, and denies or disbelieves the experience. Some victims however, are visibly upset and highly emotional, sometimes palpably terrified. These two states may even alternate. Feelings of helplessness and extreme vulnerability (which may appear as indifference to one's fate) are endemic; they may together with the re-experiencing of the original terror induce a kind of paralysis in the face of new sexual aggression; staff members must avoid interpreting such paralysis as consent. Nightmares and sleep disturbances are common. Shame, humiliation, and embarassment are characteristic. The ability to concentrate may be lost and dissociation ("spacing out") become frequent. Memory may be impaired. Victims should be encouraged but not forced to express themselves. This stage can last up to a week, but many of its features may carry over into later stages.

The second stage displays some or all of the following features: self-worthlessness or self-contempt, self-blame for the victimization (reinforced by those around him—both staff and prisonerts—who "blame the victim" in various ways), sense of being a failure, various forms of shame, severe depression, homophobic panic, anxiety, extreme insecurity, obsession with body areas involved in the rape, restlessness, urge to escape, compulsive movement, other compulsive behaviors, inability to trust (including those who are trying to help), disturbances in sexual functioning, resistance to intimacy of any kind, ambivalence towards females, fear of males, fear of being or going "crazy", fear of persecution,

cynicism, social isolation, loss of motivation, anger, and rage, often with body and mind at odds (one agitated, the other calm; later switched). Personal boundaries are confused, and relationships chaotic and conflicted. Again, some of these symptoms may persist into later stages.

This stage, when outside confinement, commonly develops a marked suppression of feelings combined with an attempt to "carry on like normal." For a prisoner who may be involved in perpetual if less violent sexual exploitation and who must continually compromise to avoid further gang-rape, this may show itself in mechanical compliance with sexual demands while remaining basically numb to the experience, and strong dependency with regard to his new master and protector. Feelings of security and protection, desperately needed, are associated with sexual performance and submission to more powerful men. Survival needs to comply with demands for a submissive role frequently overrule urges to rebel and reclaim autonomy, suppressing these but causing deep conflicts which appear as disturbances in other psychological areas.

In the third stage, which may be postponed until after release, the suppressed rage resurfaces and may be accompanied by violent behavior, obsession with vengence or with the rape experience itself, belligerence towards all holders of power (including institutional staff), disturbing sexual fantasies, phobias, substance abuse, disruption of social life, self-destructive behavior and revictimization, lifestyle disorganization, antisocial and criminal activity, and aggressive assertion of masculinity, including the commission of rape on others. The suppression period can last for many years, even decades. It is important that survivors be steered towards opportunities for continued treatment after release (with therapists knowledgeable about RTS), when their progress, once outside of the traumatic environment, is likely to dramatically improve.

The final stage involves a partial or complete resolution of these issues and a reintegration of the self which allows the

past victimization to recede in importance, though traces will remain for the rest of his life.

B. Administrative Policy and Prisoner Rape

All confinement institutions maintain formal policies against sexual assault of their residents, realizing that such assaults are not only universally offensive but subject the institutions themselves to legal consequences both financial and injunctive, jeopardize the order and security of the institution, motivate suicides and retaliatory assaults, exacerbate racial tensions, threaten major medical problems and expenses (especially the spread of AIDS), raise the general level of violence, promote antisocial attitudes, overload special housing facilities, disrupt residential arrangements, and divert large amounts of employee time and attention from other pressing problems.

Despite these policies, rape and sexual harassment continue to be major realities in most institutions, and fear of sexual

assault contributes to a violent atmosphere far beyond the actual incidence of rape. Clearly the enunciation of formal policies has not been sufficient by itself to combat this problem. In part this is due to factors inherent in the situation of confinement, but other reasons are inconsistency in applying formal policies, reluctance to acknowledge the problem and devote time and energy to it, and a failure to understand how administrative policies in other areas can handcap or favor efforts to reduce the hazard of sexual assault.

Without a basic understanding of the roots of prisoner rape, no policy can be successful. Rape of men in confinement institutions shows considerable differences from rape in the community; the environment is a crucial factor. For this reason we have included a bibliography (App. D) so that administrators can educate themselves about the nature of the problem.

Rape is primarily a power issue, and this is especially true in confinement, where prisoners are disempowered in all spheres of their life. This puts men in particular under

strong psychological and social pressure to compensate for their loss of personal power by asserting it, violently or through manipulative pressure, over other prisoners. Therefore any measures which can give prisoners a feeling of more control over their own life (without breaching the security of the institution) will help reduce the impulse towards aggression of all types against other prisoners.

Sexual deprivation, while secondary to power deprivation, is also a factor in prison sexual aggression. In this area administrative homophobia and puritanism have compounded the problem by penalizing non-assaultive sexuality among prisoners and resisting sexual visiting programs.

Prisoner sexual aggression is commonly a group activity, but there are important differences between instigators of sexual assault and those who participate in order to maintain their own standing in prisoner social groupings. Administrators should seek to drive a wedge between these two types rather than treating all alike. Even more important is the

need to clearly distinguish between coercive aggression and voluntary sex.

Administrative inconsistency is most notable in discrepancies between formal policy towards sexual assault and the actions of rank-and-file staff members and officers. These employees all too often discourage prisoner victims from actually using the channels provided by administrative policy and frequently join the perpetrators in blame-the-victim and homophobic attitudes. Some employees may consider rape the "just deserts" of criminal offenders, homosexuals, or "weaklings," while others may subscribe to myths about manhood and vulnerability which result in blaming the victim or disbelieving him. Such inconsistencies are best countered by including sexual assault matters in training programs for all persons who work in the institution, by mandatory reporting policies, and by strong administrative leadership on the part of wardens and sheriffs.

Unfortunately, too many cases have come to light where institutional employees have themselves subverted official

policy by turning a blind eye to problems of sexual assault or, worse yet, encouraging it. This encouragement has derived from attempts to recruit informers using threats of exposure to rapists, to set subgroups of prisoners against each other, and to undermine troublesome and articulate prisoner advocates, but heads of institutions must resolutely make clear to all concerned that such administrative encouragement of sexual assault is totally unprofessional, immoral, and unacceptable.

Reluctance to openly and realistically deal with the problem of prisoner sexual aggression is common, but denying or ignoring it will not make it go away and will instead allow it to fester and multiply. Using these tapes is itself a major step forward in alerting prisoners and staff alike that the administration takes this matter seriously. Incorporation of information on sexual assault in employee training programs, the posting of wall notices and inclusion of notices in prisoner handbooks, and frank discussion of sexual assault in meet-

ings with prisoners and staff will go a long way towards ending the inability of the institution to control the problem.

Because the prisoners themselves are in the best position to prevent and discourage sexual assault, administrations should attempt wherever possible to encourage peer pressure against sexual violence specifically. This becomes possible once the problem is recognized and brought out into the open through the steps outlined above. It requires a clear focus on the issue of violence and coercion rather than a moralistic lecture mixing assault with consensual sex and must appeal to the prisoners' own self-interest in putting the damper on rapes in their own midst rather than exhort them to follow institutional policy. But it is definitely worth it in terms of the headaches it can save you and your staff by preventing problems from arising in the first place.

Administrative policies in many areas have a major impact on the level of sexual violence, but often administrators are unaware of or discount these effects. Classification of incoming prisoners for differential housing assignment has been

recognized as an important tool in minimizing (though it will not eliminate) sexual harassment, but classifiers need to be made more conscious of it. Policy should be developed to evaluate each prisoner specifically as a potential target for sexual assault (see Overview) and to ensure that such evaluations are considered in all housing assignments. Double cells with cellmates chosen by the target are the safest spaces for vulnerable prisoners, with open dorms the riskiest. Attempts to keep prisoner couples apart make the passive member vulnerable to assault and increase the likelihood of retaliatory violence considerably.

Policies which penalize a target of sexual assault for physically defending himself by making him liable to disciplinary punishment for "fighting" encourage the rapist, intimidate the victim, and thus contribute to the problem.

A reliance on prosecution of sexual aggressors as the main administrative response to prisoner rape is simplistic and bound to fail as long as victims cannot realistically be guaranteed security from retaliation. Control efforts can be

helped, in cases where a victim definitely does not wish to be branded an "informer," by making a binding commitment to the victim not to bring formal charges against assailants named by him.

Protective custody is not a lasting solution for the problem of prisoner rape, and the more conditions in p.c. deprive residents of opportunities they would have in population, the more punitive it becomes, further victimizing the survivor, and the less attractive it looks to a victim considering cooperation with the authorities. Caseworkers for vulnerable or victimized prisoners in p.c. should work with the prisoner in developing a plan to deal with the problem upon return to population rather than holding it out as a permanent "solution." (An exception would be jail residents with little time remaining.) Many prisoners have been raped while in p.c., which is then no sanctuary, while others are stigmatized for having been in it and sometimes considered informers for that reason.

Policies which classify condoms as contraband can have the effect of condemning the least violent prisoners to death after a long and expensive illness, and are increasingly being changed or quietly ignored, while many institutions are informally and unofficially making condoms available to prisoners. New policies also need to be developed to assist in the fight against rape. Every institution should develop protocols for crisis intervention and follow-up in order to meet the medical, psychological, and protective needs of the victim and facilitate prosecution when the victim is willing to cooperate. Psychological support must be provided to prisoners who have been sexually assaulted and will suffer the severe effects of Rape Trauma Syndrome (see App. A) as a result. Note that even an unsuccessful attempt at sexual coercion can be highly traumatic for the target.

Survivors of sexual assault should be encouraged to confide in psychologists or chaplains, and the confidentiality of such discussions respected. The advice of such counselors to administrators about the needs of sexual assault survivors or

targets they are counseling should be taken very seriously since unless the prisoner is an informer they are usually in a position to know much more about the threat than administrative or officer staff.

Perhaps the most important step in developing an effective administrative policy to deal with sexual assault is the decision to reserve the full weight of administrative attention and punishment for instances of sexual coercion, while discontinuing sanctions against voluntary sexuality and the formation of stable, protective, and far less stressful pair bonding. Only when the focus is narrow and specific can the real problem be met head-on.

C. PROTECTIVE PAIRING

First documented in America in 1826 (not long after the building of the first penitentiaries), the institution of protective pairing has remained the prisoners' informal answer to the problem of sexual assault in confinement. In typical

confinement institutions the overwhelming majority of survivors of sexual assault in general population become "hooked up" as members of such pairs, however distasteful they may find the idea. The reason why this custom has survived for so long is that the alternatives for the rape survivor are: (1) a series of very serious and bloody fights, (2) suicide, (3) repeated gang-rapes, or (4) permanent consignment to protective custody. These alternatives are usually as unpalatable to the prisoner survivor as they are to the administration. In some institutions, administrative pressure against such relationships relationships is intense enough to leave some survivors unable to obtain protectors and therefore constantly exposed to further harassment and assault.

Since there seems to be no good and practical alternative to protective pairing, it is important for administrators to be aware of the dynamics of such arrangements. Prisoners take them very seriously, for they involve a commitment on the part of both partners which neither can break without major consequences. The quality of these relationships ranges enormously, from virtual slavery and complete exploitation at one end, to a mutually supportive, tender and humanizing exchange of affection or even love at the other.

The senior or controlling partner ("man," "daddy," "jocker," or "pitcher") is more often not a rapist himself, though he may take advantage of the consequences of a prisoner rape in "turning out" a new "punk." He obligates himself to provide complete protection for his junior partner against not only further sexual assaults but all forms of "disrespect" on the part of other prisoners, and in general the widespread knowledge of such protective arrangements among the prisoner population is sufficient to deter conflict. Any "daddy" who fails to protect his partner will make himself liable to ridicule and attempts to deprive him of his own "manhood." Thus the "hooked up" "daddies" in any institution assume most of the *actual* responsibility for preventing endemic rape in the institution, and may be considered tacit allies of the administration in its efforts to control sexual violence. These "pitchers" are overwhelmingly heterosexual and, following

working-class sexual concepts, do not consider their own acts or relationships to be homosexual. In institutions where sexual assault is seldom reported but in which administrative pressure is brought to bear against known couples, these men actually increase their liability to punitive sanctions by forming protective relationships.

It has been frequently noted by veteran staffers that aggressive "jockers" who become committed to such a relationship tend, as a result, to become less likely to engage in disruptive challenges to institutional authority, unprovoked violence, and other reckless or destructive behavior and are thus *less* of a problem to those concerned with the management of the institution. In short, they are more like "family men" with something to protect. (Experience has also shown that paired-off sexually-passive prisoners are less likely to be the focus of disruptive currents caused by competition among the "jockers" than are the unpaired passives, who are considered "unprotected."

The junior or passive partner ("catcher," whether heterosexual "punk" or homosexual "queen") gives up control over his own body to his "man" as the price for this protection. From the perspective of the rape survivor, this arrangement is not totally voluntary, since it is motivated above all by the imperatives of survival in an environment which has earmarked him as a perpetual target for gang-rape and other forms of abuse. But such "survival-driven" sexuality is a far cry from and, for most survivors, greatly preferable to, any of the alternatives. "Hooking up" also limits the survivor's risk of exposure to infection by the AIDS virus and thus plays an important role, which administrators should not overlook, in maintaining the health of the prisoner population.

While it should be clear that survival-driven relationships do not take place in an atmosphere of free choice, are often coercive, and cannot, given the frightful alternatives, be considered truly voluntary on the part of the passive partner, they are usually clearly distinguishable in many ways from sexual assaults. The rape survivor is often able to choose his

protector from among various candidates and often ends up with a certain amount of leverage within the pair relationship as long as he respects the strict limits established by the prisoner subculture. While a "daddy" will not tolerate open rebellion, he usually seeks to "get along" with his punk and to avoid an atmosphere of tyrannical slavery or total exploitation. The protector can and often does develop genuine affection for his "catcher" and can engage in some degree of mutuality in the nonsexual aspects of the relationship. Any policy that narrows the gap between (a) the punitive consequences feared by a jailhouse rapists and (b) any consequences expected by a non-rapist prospective "daddy" for "hooking up," has the effect of leaving rape survivors more exposed to follow-up assaults and is thus counterproductive to rape reduction efforts. Also, in the absence of clear indications of actual rape or force, treating the controlling partner in protective pairs as a sexual assaulter of the passive partner (despite accepted characterization of such relationships as survival-driven on the part of the passive partner), is both counterproductive and antithetical to rape reduction. Officers should be discouraged from using the threat of punishment for "voluntary" sexual activity to coerce signed allegations of rape from the passive partner against the active partner. This practice borders on blackmail, demeans the seriousness of a charge of rape, and is highly unprofessional.

Disciplinary codes rest upon an American legal tradition that divides illegal acts into two categories: voluntary acts, for which the participant is held responsible and punishable; or coerced acts, in which case the doer is held to be a victim and considered neither responsible nor punishable. The reality of survival-driven protective pairings, as applied to the passive member, does not fit into this neat scheme, and therefore presents an administrative dilemma when it comes to fair application of certain provisions of disciplinary codes.

By and large, the "pitcher" gives orders and the "catcher" follows them; in a particularly rough institution, the "catcher" may have no more free will than a slave (this is especially so when the catcher belongs to a gang). Thus a "catcher" is

often required to engage in prohibited acts as a condition of his protection, and the free will to violate the disciplinary code that we normally assume to be a precondition for punishment is actually absent. The extent to which such violations are coerced is, however, usually difficult to ascertain, and administrators often feel they cannot just ignore certain types of violations without losing control of the institution. Recognizing these problems, disciplinary bodies are urged to consider the powrlessness of the "catcher" as a mitigating factor of great weight, if not an exculpatory one, in resolving the disciplinary charges involving those types of infractions that are likely to have been ordered by another prisoner.

Protective pairs usually include numerous survivors of sexual assault in prior institutions (juvenile facilities, jails, other prisons) who have learned to "hook up" as soon as possible after arrival in any new confinement site in order to avoid getting raped there. They may not be perceived as rape survivors by staff in their current institution who do not

know their full history, but may erroneously be considered homosexual.

As long as protective pairing remains (for lack of a less damaging alternative) the primary refuge of the sexual assault survivor, administrators who seek to disrupt it should realize that doing so greatly adds to the vulnerability of the known "catcher" and significantly increases the likelihood that he will again fall victim to rape and other forms of sexual coercion. Rape survivors, having considered all other possible courses of action, may choose to enter into a protective pairing relationship as the least damaging way to survive. Administrators who respect this very difficult decision (by supporting requested housing assignments, for example) will be better able to reduce and control sexual violence in their institutions.

Psychologists, chaplains and others in counseling positions should not hesitate to address themselves nonjudgmentally to the psychological and social dynamics of a relationship

which is likely to be the survivor's only lifeboat in a storm-tossed sea.

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Established in 1979 by Russell D. Smith as "People Organized to Stop Rape of Imprisoned Persons" (POSRIP)

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WHAT IS "STOP PRISONER RAPE"?

Stop Prisoner Rape (SPR) is a small national non-profit organization dedicated to combatting the rape of prisoners and providing such assistance as we can to survivors of jail-house rape.

Both our president and executive director are survivors of jail gang-rapes which followed arrests for protesting the war in Indochina, and its president spent nearly five years in federal prison. Thus we maintain a practical perspective rather than an academic one. We believe that prisoners themselves can be most effective in discouraging rape in their own institutions, but believe there is much that administrators must and can do to address this horror. We are not a prisoner organization, but we welcome membership from anyone, including prisoners, who is dedicated to the effort to stop prisoner rapes.

According to the best and most thorough statistical survey of a prison (a medium-security California institution, reported in 1982 by Prof. Wayne Wooden and Jay Parker), 14% of the entire prison population was sexually assaulted in that prison. The authors believed that this *underreported* the extent of rape, and being limited to events in that institution it did not count prisoners who had been raped in jails or other prisons and learned to pair off with a protector as soon as they arrived. The only survey of a jail, by Philadelphia District Attorney Alan Davis in 1968, reported that over 3% of the men who passed through the jails of that city were sexually assaulted; Davis also stated he believed it to be an undercount. We do not know how many boys are raped in juvenile facilities, but by all accounts the situation is the worst at that level. Women prisoners are raped by male institutional employees to an unknown extent.

SPR has taken the position that rape is **menticide**, the killing of the mind and spirit. The consequences of rape trauma syndrome, already horrendous for female and gay male

victims in the community, are greatly magnified for incarcerated males who are forced into an unfamiliar passive sexual role (most victims as well as almost all jailhouse rapists are heterosexual by self-description and by practice outside of confinement) and then must adapt to a continuous unwanted same-sex situation from which they cannot escape. While most victims are heterosexual, known homosexual prisoners are particularly likely to be targeted for sexual assault and often find that institutional staff is indifferent to their plight. Furthermore, with most systems refusing to allow condoms in their institutions, and HIV rampant among prisoners, survivors who pair off with a protector in order to avoid continuous gang rape (the usual outcome) are put at great and avoidable risk of infection with the AIDS virus.

We do not hesitate to point out that too many institutions have in the past either turned a blind eye towards this horror, or even tacitly encouraged it, but we feel that since sexual assault and the constant fear of it and countermeasures which result are extremely disruptive and time-consuming, in the age

of AIDS the financial consequences of medical care for infected survivors are staggering, and survivors are increasingly successful in winning major damages in the courts, we can find common cause with modern administrators and staff and work together to limit this scourge of life behind bars. We believe, however, that this effort will usually require a reevaluation of institutional policies in many areas, particularly with regards to reporting of incidents and prosecution of offenders, protective custody, housing assignments, protective pairing, non-assaultive sexuality, medical procedures, psychological aftercare, confidentiality in counseling, prisoner orientation, and staff training.

SPR does what it can with very limited resources to educate prisoners, the public, and incarceration professionals, and to reach out to survivors both in and outside the walls. We want to cooperate with administrators willing to face this problem by providing realistic staff training and information. Eventually we would like to provide face-to-face counseling for incarcerated survivors. We also provide free literature to prisoners

and free copies of a 90-minute audio tape, *Becoming a Survivor*, to prisoners who have been or expect to be sexually assaulted and who request and are allowed to receive them. SPR worked with the Safer Society Press (a national project of the New York State Council of Churches) to produce the Prisoner Rape Education Project (PREP), of which this tape is a part. Another tape is designed for prisoner orientation programs and emphasizes rape avoidance (both also available in Spanish), while a 46-page booklet for institutional staff members (with a foreword by the Vermont Commissioner of Corrections) discusses realistic ways that the institutions can discourage rape and improve the wretched lot of the survivor. We strongly urge institutions to acquire the PREP materials, use the tapes, and circulate the booklet among administrators, mental health professionals, chaplains, medical personnel, caseworkers and counselors, staff trainers, protective custody unit staff, and line officers, each of which (except for p.c. staff) will find a section addressed to their own specialty.

Much of our work consists in attempts to end the curtain of silence which has so long surrounded the rape of prisoners. Rape of males has long been such a tabooed subject for public discussion that numerous myths and misconceptions have been allowed to flourish. It is important to know that **anyone** can be raped, that rape is a crime of power which cannot alter the victim's masculinity or sexual orientation.

Once a prisoner is raped, he is stigmatized and marked as a victim for repeated sexual assault for as long as he remains locked up. Most victims are young, straight, and non-violent, unable to defend themselves against ruthless exploitation. **The purposes of SPR are to provide education, information, and advocacy at all levels with regard to this ongoing nightmare of sexual assault and enslavement; to provide encouragement, advice, counseling, and legal support to survivors; to train the staff which must deal with them; and to combat this systematic horror in every way possible.**

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QUESTION PRESENTED

Does a heightened deliberate indifference standard apply to inmate housing assignment decisions and other actions that prison officials take to preserve institutional security.

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TABLE OF AUTHORITIES

In the

Supreme Court of the United States

October Term, 1993

No. 92-7247

DEE FARMER,

Petitioner,

v.

EDWARD BRENNAN, WARDEN, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF MARYLAND, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, DELAWARE, GEORGIA, HAWAII, INDIANA, KANSAS, KENTUCKY, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WISCONSIN AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of respondents.

INTEREST OF *AMICI CURIAE*

This case involves important questions concerning the ability of federal and state prison administrators to operate correctional facilities consistent with the Eighth Amendment. The resolution of these questions requires defining the Eighth Amendment standard that controls

inmate housing decisions and is of major significance to the states because that standard implicates the core of the states' ability to administer their prison systems. All states, as does the federal government, regulate the housing assignment of inmates within their prison systems to minimize the safety risks that inmate classification decisions pose to inmates, correctional officers, administrators and visitors. Maryland, for example, considers an inmate's history of violence, criminal background, and offense severity, and other factors in determining the type of correctional facility (minimum, medium or maximum security) in which to place that individual, *see* Maryland Division of Corrections Regulation No. 100-1, VI.B.3 (1991), and examines an assortment of other criteria through a mandatory investigation process in deciding whether that inmate, or any inmate who is presently assigned to a particular institution, needs to be housed in administrative detention or protective custody either for the protection of the inmate or other inmates. *See* Division of Corrections Directives 100-131; 100-141; 100-142; 100-147; 100-148.

The Eighth Amendment does not create a constitutional cause of action enabling prisoners to seek judicial review of whether prison officials made the right housing assignment decision in implementing these types of security regulations. Inmate housing decisions in Maryland and other states are difficult and complex, and depend ultimately on the collective judgment of experienced administrators concerning the best assignment for each inmate. It is constitutionally unwarranted and practically unrealistic to superimpose upon the exercise of that discretion the constitutional *per se* rule that the petitioner demands: that certain inmates, because of sexual orientation or specific circumstances that the courts are somehow to identify, should not be assigned to the

general population of a prison and instead should be placed in "safer" housing. Such a rule advances no Eighth Amendment interests and needlessly infringes upon the uniquely subjective assessments concerning safety risks and other factors that influence all prisoner housing decisions. Conversely, requiring administrators to sequester certain groups of inmates to protect them from their fellow inmates and the dangers found in all prisons will compel prison officials throughout the country either to find special housing for large categories of prisoners in the already severely overcrowded state and federal prison systems, or to face strict liability for failing to do so. The Eighth Amendment does not compel such harsh choices.

STATEMENT

The petitioner describes himself as "a pre-operative transsexual" (Pet. at 2-3), who "is a genetic or biologic[al] male. . . ." (J.A. 43 ¶ 1.)[1] In 1986, the petitioner was convicted in the United States District Court for the District of Maryland of conspiracy to commit credit card access device fraud in violation of 18 U.S.C. § 1029, and was sentenced to imprisonment for a term of twenty (20) years. (Pet. at 2; J.A. 53 ¶ 36.) From the time he was first incarcerated through the time of the incident giving rise to his claims in this case, the petitioner was assigned to a total of six (6) federal prisons; throughout his incarceration, the petitioner admits that he operated a credit card fraud scheme. (J.A. 57 ¶ 52.) The petitioner

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[1] The record in this case is limited because the petitioner's claims were dismissed by the district court's decision granting the respondents' summary judgment motion following a period in which brief discovery took place. Many of the references in this statement are, therefore, to either the petitioner's Amended Complaint (J.A. 43) or a declaration the petitioner filed in opposition to the summary judgment motion. (J.A. 107.)

has been transferred on two separate occasions because of multiple disciplinary violations he had committed in connection with credit card fraud and other unlawful conduct he engaged in while incarcerated.

After brief assignments to the United States Medical Center for Federal Prisoners at Springfield, Missouri, where he acknowledges he received a disciplinary report for "credit-card misuse" (J.A. 112 ¶ 16; J.A. 58 ¶ 53), and to the Federal Correctional Institution at Elreno, Oklahoma, the petitioner was assigned to the United States Penitentiary at Lewisburg, Pennsylvania. (J.A. 56 ¶¶ 46-48.) The petitioner was assigned to administrative detention by officials at Lewisburg who determined that he would not be safe in the prison's general population.[2] The petitioner admits that while at Lewisburg he received two disciplinary reports related to illegal credit card use. (J.A. 57 ¶ 53.) He was subsequently transferred to the Federal Correctional Institution at Petersburg, Virginia, where he was placed in the general prisoner population except for time spent in administrative detention due to disciplinary infractions he committed there. (J.A. 58-59 ¶ 58.)

In his Amended Complaint, the petitioner alleges that he was sexually assaulted while in the general prisoner population at Petersburg, but admits that he failed to bring those alleged assaults to the attention of prison officials. (J.A. 59 ¶ 60.) The Amended Complaint also

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[2] In response to those efforts to protect him, the petitioner promptly sued, claiming, *inter alia*, that his confinement in administrative segregation violated his right not to be subjected to cruel and unusual punishment under the Eighth Amendment and his right not to be discriminated against under the Fourteenth Amendment. *See Farmer v. Carlson*, 685 F.Supp. 1335 (M.D.Pa. 1988).

alleges that at Petersburg the petitioner received a number of incident reports related to credit card fraud and other proscribed behavior. (J.A. 59 ¶¶ 61-62.) As a result of these infractions, the petitioner, who prison officials classified "as a Security Classification Level 5 inmate under Bureau of Prisons policy" (J.A. 11 ¶ 4), was transferred to the Federal Correctional Institution at Oxford, Wisconsin, which is a Level 4 institution. (J.A. 60 ¶ 64; J.A. 26.) The petitioner was placed in the general prisoner population at this federal prison. (J.A. 61 ¶ 71.)

Although the petitioner claims that he was sexually pressured by other inmates at Oxford, he has made no allegation that he communicated this information to Oxford prison officials. (J.A. 61 ¶ 71; J.A. 111 ¶ 14.) The petitioner's pattern of credit card-related and other disciplinary violations continued unabated at Oxford. (J.A. 62-63 ¶¶ 80, 81, 85; J.A. 112 ¶ 19.) Among other violations, the petitioner engaged in a sex act with another inmate knowing that the petitioner had tested positive for the human immunodeficiency virus (HIV) and that this behavior posed a significant risk to other inmates. (J.A. 10-11 ¶ 3; J.A. 113 ¶ 19.) As a result of his continuing credit card fraud violations, Oxford officials filed a request for a disciplinary transfer and recommended that the petitioner be sent to the United States Penitentiary at Leavenworth, Kansas, which is a Level 5 maximum security institution. (J.A. 32-33; 63 ¶ 82.) Instead, he was transferred to the United States Penitentiary at Terre Haute, Indiana, a Level 4 institution (J.A. 17 ¶ 9; J.A. 34), which the petitioner acknowledged in a declaration he filed in the district court "offered greater security than any other level 4 institution." (J.A. 115 ¶ 23. *See also* J.A. 11 ¶ 4 (prison official declaration asserting that petitioner was transferred to Terre Haute "for the purpose of placing

him in a different environment consistent with his individual security needs.").)

The Amended Complaint alleges that the petitioner was received at Terre Haute on March 9, 1989 and placed in administrative segregation until March 23, 1989, when he was released into the general population and assigned to Unit 3M. (J.A. 64 ¶ 88.) His assignment in this unit occurred after he was individually evaluated for assignment within this federal prison facility. (J.A. 94 ¶ 5; 28 C.F.R. § 522.21.) On April 1, 1989, the petitioner was allegedly attacked in his cell by another inmate. (J.A. 64 ¶ 24.) The petitioner subsequently filed suit in the United States District Court for the Western District of Wisconsin, claiming that various prison officials violated his Eighth Amendment rights in transferring him to Terre Haute and placing him in the general prisoner population there. (J.A. 43-44 ¶ 1.) Finding that "[n]one of the defendants had actual knowledge there was a threat to plaintiff's safety at USP-Terre Haute" and that "Plaintiff never expressed any concern for his safety to any of the defendants" (J.A. 123, 124), the district court held that the officials did not act with deliberate indifference to the petitioner in violation of the Eighth Amendment. (J.A. 124.) The Seventh Circuit summarily affirmed the district court's decision. (J.A. 127.)

SUMMARY OF ARGUMENT

The resolution of the petitioner's claims has sweeping ramifications for officials in federal and state prisons throughout the country because those claims directly call into question the ability of prison administrators to make housing assignment decisions for all inmates. Stripped of its rhetoric, the petitioner's argument is that prison officials have a mandatory

obligation under the Eighth Amendment, solely because of a prisoner's status as a pre-operative transsexual, either to house that prisoner separately from a penal institution's general inmate population or to confine him in a hypothetically "safe" institution. In protecting prisoners against the infliction of "cruel and unusual punishments", however, the Eighth Amendment proscribes only the "unnecessary and wanton" infliction of pain, and exposes officials to liability only when they act with "deliberate indifference" with respect to an inmate's safety. No *per se* violation of the Eighth Amendment results from the failure to place a prisoner in administrative detention or otherwise isolate that individual from other inmates.

The mere assignment of an inmate to a prison's general population is insufficient proof by itself to establish that officials intended to subject that inmate to "punishment" within the meaning of the Constitution, regardless of whether the inmate is a pre-operative transsexual, a homosexual, a child abuser, or otherwise characterized. Inmate housing decisions involve complex and sensitive issues, occur with great regularity, and are instrumental in the daunting task of ensuring the safety of inmates and correctional officers, which is perhaps the most important and difficult of the many responsibilities administrators assume in their effort to maintain prison security and order. The Eighth Amendment requires the application of a heightened deliberate indifference standard in the context of inmate assignment decisions that appropriately balances these strong institutional interests against the constitutional rights of prisoners. Such a standard should impose liability only when the risk of injury is so obvious and likely to result in harm that the officials' actions lack any good faith basis and give rise to an intent to injure.

Prison officials should not be found to be deliberately indifferent to the safety of an inmate who is assaulted in the general prisoner population when, as here, officials specifically have considered that inmate's situation and legitimately have exercised their judgment that administrative detention for that inmate was no longer warranted. The violent nature of the prison environment demands that administrators be accorded substantial deference in matters of institutional security and safety. That deference extends to the enforcement of rules and regulations that all penal officials, including those named as respondents here, routinely follow to maximize prison security and minimize the threat that individual inmates face in institutions throughout the federal and state prison systems. The process of weighing whether a particular inmate is so much more at risk than are other members of the prison population that administrative segregation is warranted is fraught with subjective evaluations, intuitions and predictions that courts are ill-equipped to second guess on a retrospective basis. The decision below should be affirmed because the respondents appropriately executed their discretion in addressing the myriad problems of prison population and administration, and properly discharged their responsibility to take reasonable steps to safeguard an inmate committed to their custody.

This Court should reject the petitioner's invitation to create a *per se* rule of liability based solely on his status as a pre-operative transsexual because the judiciary should not be in the business of telling prison officials what risks are so obvious as to impose automatically Eighth Amendment liability. All inmates are at risk of being attacked by other prisoners because all prisoners have been convicted of having violated the law and many of these individuals are dangerous. An Eighth Amendment rule that extends a heightened duty of care to

certain classifications of prisoners has no boundaries because there are a diversity of human characteristics that, depending on the particular prison setting, will always under such an unbridled rule command a greater need for protection for virtually any class of individuals. Simply put, no prisoner is "ordinary" and it trivializes the Constitution to expand the protective scope of the Eighth Amendment solely on the basis of a prisoner's sexual orientation or other attributes. This Court should read the Cruel and Unusual Punishments Clause to mean what it says and affirm the decision below.

ARGUMENT

A HEIGHTENED DELIBERATE INDIFFERENCE STANDARD SHOULD APPLY TO CLAIMS CHALLENGING THE ADEQUACY OF ACTIONS THAT PRISON OFFICIALS TAKE TO PRESERVE INSTITUTIONAL SECURITY

A. The Eighth Amendment in the context of inmate housing assignment decisions requires a heightened deliberate indifference standard to balance adequately the interests of prison officials in maintaining prison security and the competing rights of prisoners.

An analysis of the question that this case presents should begin with the language of the constitutional provision that the petitioner claims was violated here. "The Eighth Amendment, in only three words, imposes

the constitutional limitation upon punishments: they cannot be 'cruel and unusual.'" *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981). While this Court's earlier decisions interpreted this Amendment to proscribe physically barbarous punishments, *see, e.g., Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); *In re Kemmler*, 136 U.S. 436, 447 (1890), this Court has since announced a more expansive view and "held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,' or which 'involve the unnecessary and wanton infliction of pain.'" *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976), quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). The present constitutional inquiry is two-fold: "[C]ourts considering a prisoner's [Eighth Amendment] claim must ask both if 'the officials acted with a sufficiently culpable state of mind' and if the alleged wrongdoing was objectively 'harmful enough' to establish a constitutional violation." *Hudson v. McMillian*, 112 S.Ct. 995, 999 (1992), quoting *Wilson v. Seiter*, 111 S.Ct. 2321, 2326, 2329 (1991).

This constitutional protection does not sweep broadly, however, as "[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny. . . ." *Whitley v. Albers*, 475 U.S. 312, 319 (1986). To the contrary, "the protection afforded by the Eighth Amendment is limited." *Ingraham v. Wright*, 430 U.S. 651, 669-70 (1977). For example, "in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'" *Estelle v. Gamble*, 429 U.S. at 105-06. In all situations, "[t]o be cruel and unusual punishment, conduct that does not

purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety." *Whitley v. Albers*, 475 U.S. at 319. Rather, "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Id.*

The Eighth Amendment requirement of "obduracy and wantonness" varies according to the specific state concerns and prisoner interests that are at stake in each situation and must take into account the "differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley*, 475 U.S. at 320. In *Whitley*, which involved a prisoner who was shot in the leg by correctional officers attempting to quell a prison riot, this Court found that a strict standard was warranted, recognizing that "in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used." *Id.* at 320. Thus, an assessment of whether wantonness existed in that setting required considering "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." 475 U.S. at 320-21, quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir.) (Friendly, J.), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973).

In contrast, the Court in *Whitley* noted, it was appropriate in *Estelle* to measure prison officials'

wantonness against the "deliberate indifference" standard "because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." 475 U.S. at 320. Subsequently, in *Wilson v. Seiter*, the Court extended that rationale beyond the provision of medical care in deciding that other acts taken by prison officials are also to be evaluated under the deliberate indifference standard. Observing that "the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates," 111 S.Ct. at 2326-27, this Court stated "[t]here is no indication that, as a general matter, the actions of prison officials with respect to these nonmedical conditions are taken under materially different constraints than their actions with respect to medical conditions." 111 S.Ct. at 2327. Thus, in cases challenging the conduct of officials in these contexts, "'it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*.'" *Id.*, quoting *LaFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987) (Powell, J.).

This passage, and a string citation of cases immediately following it that contains two prisoner assault cases, *see* 111 S.Ct. at 2327, citing *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir.), *cert. denied*, 488 U.S. 823 (1988); *Morgan v. District of Columbia*, 263 U.S.App.D.C. 69, 824 F.2d 1049 (1987), make clear that the deliberate indifference standard applies in this case. But because "wantonness does not have a fixed meaning," *Wilson*, 111 S.Ct. at 2326, an assessment of the "wantonness" of the prison officials' actions in this case must take into account the situation in which the petitioner's claim arises -- just as in *Whitley* and *Hudson*

v. McMillian, 112 S.Ct. at 999, this Court found the situations there warranted a "sadistic and malicious" standard. The different types of conduct that this Court in *Wilson* found should be scrutinized under the deliberate indifference standard do not merit exactly the same Eighth Amendment analysis because they do not each present the same balance of state concerns against prisoner interests. Rather, because the Eighth Amendment applies to a vast continuum of behavior with respect to which the riot situation in *Whitley* and the medical care in *Estelle* mark two defined points, the constitutional standard to be applied must be tailored to the specific conduct at issue.

This case falls closer to *Whitley*: while it does not involve the riot situation that this Court has held should be evaluated under the strict sadistic and malicious standard, the petitioner's claim that he either should not have been transferred to the United States Penitentiary at Terre Haute, or should have been protected from the general prisoner population there, nonetheless involves closely related safety issues that trigger many of the same "important governmental responsibilities" that this Court in *Whitley* found "a deliberate indifference standard does not adequately capture. . . ." 475 U.S. at 320. Specifically, the inmate housing assignment decision challenged in this action implicates vital safety concerns, thus strongly illustrating that this is not a case in which "'deliberate indifference to a prisoner's serious illness or injury' can . . . be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates." *Whitley*, 475 U.S. at 320, quoting *Estelle*, 429 U.S. at 105.

Policies and practices oriented toward the protection of prisoners lay at the heart of a prison's operations, as "[t]he safety of the institution's guards and

inmates is perhaps the most fundamental responsibility of the prison administration." *Hewitt v. Helms*, 459 U.S. 460, 473 (1983). The specific assignment of inmates within a prison is critical to the ability of administrators to fulfill this essential obligation to protect prisoners and staff and to meet "the central objective of prison administration, safeguarding institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). These are "difficult and sensitive matters of institutional administration and security," *Block v. Rutherford*, 468 U.S. 576, 588 (1984), and they are placed directly at issue by the petitioner's challenge to his assignment in the general prisoner population of Terre Haute. A deliberate indifference standard higher than that which this Court applied in *Estelle* and *Wilson* is warranted in this case to balance adequately these interests of prison officials in ensuring prison safety and security against the Eighth Amendment rights of inmates.

B. Prison officials cannot be held liable for failing to protect a prisoner from being assaulted by another inmate unless the risk of harm is so obvious and likely to result in the assault that the failure to act gives rise to an intent to harm.

In cases such as this in which prison officials deliberate over the inmate assignment decision that forms the basis of the prisoner's claim, "the realities of prison administration," *Helling v. McKinney*, 113 S.Ct. 2475, 2482 (1993), weigh heavily in assessing whether the acts or omissions of those officials constitute wanton behavior that the Eighth Amendment proscribes. Those realities require a standard that imposes liability on prison officials

in cases involving prison security only when they act with "such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Whitley*, 475 U.S. at 321.

Whitley foreshadowed the extension of this standard to prison security cases in the non-riot context by immediately following its pronouncement of this standard with an explanatory citation to *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986), which *Whitley* described as "equating 'deliberate indifference,' in an Eighth Amendment case involving security risks, with . . . '[. . .] an act so dangerous that the defendant's knowledge of the risk can be inferred'". 475 U.S. at 321, quoting *Franzen*, 780 F.2d at 652.[3] In later concluding in *Wilson* that the Eighth Amendment's use of the word "punishment" means that "some mental element must be attributed to the inflicting officer before it [pain] can qualify [as punishment]," 111 S.Ct. at 2325, this Court again tacitly approved of this heightened deliberate indifference standard in the security context by quoting the following passage from that same page of the *Franzen* decision:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century. . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be

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[3] In *Franzen*, 21 prison inmates who were placed on a bus and handcuffed and chained together for security reasons claimed their Eighth Amendment rights were violated because prison officials failed to implement effective precautions with respect to the consequences of a fire that subsequently occurred on the bus.

> punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.

Wilson, 111 S.Ct. at 2325 (brackets supplied by this Court).

The standard that should apply in the context of a prisoner assault case, therefore, is one that imposes liability only when the risk of injury is so plain and the ensuing harm so apt to occur that the actions of responsible prison officials taken in such circumstances can be found to be sufficiently lacking in good faith such that an intent to harm can be reasonably inferred. *See, e.g., McGill v. Duckworth*, 944 F.2d 344, 351 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992) ("Suspecting that something is true but shutting your eyes for fear of what you will learn satisfies scienter requirements. Going out of your way to avoid acquiring unwelcome knowledge is a species of intent."). Conversely, prison officials should not be held liable for injuries that an inmate sustains in an attack by another prisoner in the prison's general population when those officials legitimately have exercised their discretion that the injured inmate should be assigned there.

Deliberate indifference in the context of municipal liability means that a city may be found liable for injuries caused by inadequacies in a police training program when "the need for more or different training is so obvious, and the inadequacy [is] so likely to result in the violation of constitutional rights. . . ." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). The setting of a prisoner assault case demands an even greater deliberate indifference showing than that required in *City of Canton* because of the need to safeguard the institutional concerns that prison

administrators face. "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel," *Bell v. Wolfish*, 441 U.S. at 547, and so it is essential that administrators be accorded significant leeway in decisions concerning inmate assignment and prison security.

This discretion is warranted by the very nature of prisons which, "by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for anti-social criminal, and often violent, conduct." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). The instability and unpredictability of that environment necessarily means that the administrators' exercise of their obligation to protect the safety of inmates is charged with intuition and speculation concerning what safety measures are warranted:

> In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like. *In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents.* The judgment of prison officials in this context, like that of those making parole decisions, turns largely

> on "purely subjective evaluations and on predictions of future behavior," *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981); indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution.

Hewitt v. Helms, 459 U.S. at 474 (emphasis added).

The volatile nature of the prison setting demonstrates why "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Rhodes v. Chapman*, 452 U.S. at 349, n.14. This Court has recognized that the deference accorded prison officials in security matters "extends to a prison security measure taken in response to an actual confrontation with riotous inmates" *and "to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline*." *Whitley*, 475 U.S. at 322 (emphasis added). That deference requires a heightened showing of deliberate indifference to make out an Eighth Amendment violation with regard to such anticipatory safety measures, including the inmate assignment decision at issue here. Of course, this "does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." *Id.* Officials should not escape liability by choosing either to ignore risks of which they are aware or to do nothing in the face of risks that are very obvious and apparent. Nor should they be able to avoid their obligations under the Eighth Amendment by engaging in a bad faith review of an inmate's safety needs.

There is no evidence in this case, however, of any such conduct. To the contrary, the warden of the United States Penitentiary at Terre Haute stated in an unrefuted sworn declaration filed in the district court that prison officials there complied with federal prison regulations "to professionally evaluate inmate Farmer's particular needs and situation and determine the most appropriate specific placement upon his designation to USP-Terre Haute." (J.A. 94 ¶ 5.) The conscious decision to remove the petitioner from administrative segregation and place him in the general prisoner population based on such an individualized evaluation means that this case "is quite different from one involving injuries caused by an unjustified attack by prison guards themselves, or by another prisoner where prison officials simply stood by and permitted the attack to proceed." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (citations omitted). Such an assignment decision "does not amount to cruel and unusual punishment simply because it may appear in retrospect . . . unreasonable, and hence unnecessary in the strict sense." *Whitley*, 475 U.S. at 319.

Because prison officials in *every* case must consider where within a prison an inmate should be assigned, it *should* be "very difficult to demonstrate that prison authorities are ignoring the possible dangers posed by exposure" of an inmate to the general population. *Helling v. McKinney*, 113 S.Ct. at 2482. This case accentuates the need for applying a heightened deliberate indifference standard to inmate assignment decisions because it underscores the difficulty that officials routinely face when seeking to evaluate an inmate's need for special protection. Notwithstanding the petitioner's individualized placement evaluation at Terre Haute, the petitioner asked none of the officials responsible for that evaluation to place him in administrative segregation. In fact, the

district court below found that the petitioner never communicated any concerns for his safety to either the warden or any of the other respondents. (J.A. 123-24.) Moreover, the petitioner in his Amended Complaint acknowledged that he failed to report to prison officials sexual assaults he claims he experienced while in the general population of FCI-Petersburg (J.A. 59 ¶ 60), and, similarly, has made no allegation that he brought to the attention of any prison officials the sexual pressure he now maintains he was subjected to while in the general population of FCI-Oxford, where he was housed immediately prior to being transferred to Terre Haute. (J.A. 61 ¶ 71.)

These facts are obviously relevant to the question of whether the respondents acted with deliberate indifference; however, neither they nor any other single factor can be dispositive of whether these prison officials had a mandatory constitutional obligation to transfer the petitioner elsewhere or assign him to administrative segregation, as the assignment decision at issue here is inherently subjective in nature. Applicable Department of Justice regulations that govern the assignment of all inmates within the federal prison system evidence the highly subjective quality of this assignment process and that the decision to protect any prisoner is laden with individual judgment.[4] The exercise of this judgment,

[4] Federal prison regulations provide that all "Bureau of Prisons staff screen newly arrived inmates to ensure that Bureau health, safety, and security standards are met." 28 C.F.R. § 522.20. With the exception of prison camps and other such facilities "where segregating a newly arrived inmate in detention is not feasible," the regulations provide that the warden of each institutional facility "shall ensure that a newly arrived inmate is cleared by the Medical Department and provided a social interview by staff before assignment to the general population." *Id.*, § 522.21(a). Regulations also provide that "[i]mmediately upon an inmate's arrival, staff shall interview the inmate to determine if there are non-medical reasons for housing the inmate away from the general population. Staff shall evaluate both the general physical appearance and emotional condition of the inmate." *Id.*, § 522.21(a)(1). The regulations attempt to provide some guidance in the exercise of these decisions and provide in relevant part that "[s]taff may consider the following categories of inmates as protection cases: (1) Victims of inmate assaults; . . . (3) Inmates who have received inmate pressure to participate in sexual activity; . . . (6) Inmates who refuse to enter the general population because of alleged pressures from other unidentified inmates; (7) Inmates who will not provide, and as to whom staff cannot determine, the reason for refusal to return to the general population; and (8) Inmates about whom staff has good reason to believe the inmate is in serious danger of bodily harm." *Id.*, § 541.23(a).

moreover, often provokes opposition from the inmate himself.[5] The prisoner in this case, for example, sued officials at the United States Penitentiary at Lewisburg when he was segregated from the general population at that facility for safety reasons, and claimed the opposite of what he contends here -- he alleged that the actions that prison officials took to protect him because of his status as a pre-operative transsexual constituted cruel and unusual punishment in violation of his rights under the Eighth Amendment. *See Farmer v. Carlson*, 685 F.Supp. 1335 (M.D. Pa. 1988). He also asserted that his assignment in administrative segregation discriminated against him on the basis of his sex. *Id.*

The petitioner's litigation history is representative of the tensions that prison officials face when they undertake "reasonable measures to guarantee the safety of . . . inmates. . . ." *Hudson v. Palmer*, 468 U.S. at 526-27. Because these subjective judgments are always implicated

[5] Inmates routinely challenge decisions affecting their transfer for security reasons. *See, e.g., Olim v. Wakinekona*, 461 U.S. 238 (1983); *Meachum v. Fano*, 427 U.S. 215 (1976).

when prison officials act to maintain prisoner safety and security, substantial deference should be accorded the manner in which those measures are implemented to "convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U.S. at 320. Requiring anything less than a heightened showing of deliberate indifference in inmate assignment cases is inconsistent with that deference and would advance neither institutional nor Eighth Amendment concerns.

C. Transferring a prisoner to a penitentiary for which he was eligible and assigning him to the general population there do not constitute deliberate indifference solely because that prisoner is a pre-operative transsexual.

Applying a heightened deliberate indifference standard to the petitioner's claim that he was assigned improperly to the general prison population represents an appropriate balance between the interests underlying the Eighth Amendment against the infliction of cruel and unusual punishments, and the countervailing interest in allowing prison officials to attend to internal security and other features of prison administration unhindered in their judgments by concerns for legal liability. *Cf. Hewitt v. Helms*, 459 U.S. at 474, n.7. But applying a standard that in effect holds the prison officials in this case liable under the Eighth Amendment solely because of the petitioner's status as a pre-operative transsexual will further none of the important interests discussed above, and will instead "effectively collapse[] the distinction between mere

negligence and wanton conduct," *Whitley*, 475 U.S. at 322, because it will eviscerate "the difference between one end of the spectrum -- negligence -- and the other -- intent. . . ." *Daniels v. Williams*, 474 U.S. 327, 335 (1986). The protection against cruel and unusual punishments does not encompass such a minimalist standard of constitutional liability.

The deliberate indifference standard that the petitioner asks this Court to apply in this case is even lower than the standard the Court has applied in other contexts that do not involve the state concerns at issue here, and would allow courts to second guess by rote prison administrators in their daily management functions without promoting any Eighth Amendment interests. Even under the deliberate indifference standard that this Court applied in *City of Canton v. Harris*, 489 U.S. at 390, officials would not be subject to Eighth Amendment liability when they legitimately exercise their discretion and assign to a prison's general population an inmate who is assaulted by another prisoner, as such an assignment decision does not constitute deliberate indifference merely because it may be the result of faulty judgment. *See Whitley*, 475 U.S. at 319. Yet a very different result would be reached under the petitioner's standard, which cuts off any inquiry concerning the legitimacy of that assignment decision and would impose liability simply upon a finding that the risks engendered in such a decision were "obvious" or "overwhelming." (Pet. Br. at 12.) Courts under this approach would regularly instruct prison officials what risks are obvious and routinely would place themselves in the business of micromanaging the judgment of administrators in maintaining institutional security and order.

There is no support for such an unorthodox and

relaxed reading of the Constitution that would allow prison administrators to be held responsible for failing to estimate properly the risk of assigning inmates to the general prison population. Prison "[o]fficials cannot realistically be expected to consider every contingency or minimize every risk," *Whitley*, 475 U.S. at 325, because there exists in virtually all prisons an "ever-present potential for violent confrontation and conflagration," *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977), due to the individuals incarcerated there:

> Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Hudson v. Palmer, 468 U.S. at 526.

Recently compiled statistics of the Bureau of Justice show that from July 1, 1989 through June 30, 1990, prison officials reported 21,184 incidents in which inmates in state confinement assaulted other inmates, resulting in an average of 34.9 assaults per 1,000 inmates, and 406 incidents in which inmates in federal confinement attacked other prisoners, averaging 7.4 assaults per 1,000 inmates. *See* May 6, 1992 Bureau of Justice Statistics, U.S. Dept. of Justice, *Census of State and Federal Correctional Facilities, 1990*, at 5, Table 6. Statistics on violent crime in the state and federal prison systems referred to in *Hudson* and other cases, *see, e.g., Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d at 562; *Young v.*

Quinlan, 960 F.2d 351, 362-363 (3rd Cir. 1992), further illustrate the dangerous environment found in penal institutions throughout our Nation.

All prisoners are at risk, therefore, of being attacked by other inmates; indeed, the petitioner has acknowledged candidly "that numerous prisoners, who are not transsexual, request protection at USP-Terre Haute" (Pet. at 5), and conceded in a declaration he submitted in the district court that he "was sexually pressured by inmates even while in detention." (J.A. 118 ¶ 27.) In view of these undisputed facts of prison life, even if prison officials underestimated the risks that the petitioner faced in comparison to the risks confronting other inmates when they arranged for the petitioner's transfer to Terre Haute, and even if these officials determined incorrectly that he faced no greater risks than other inmates in being assigned to that prison's general population, that simply means that, at most, the petitioner may have a claim under the Federal Tort Claims Act. That does not mean, however, that these officials acted with deliberate indifference unless this Court transforms the Eighth Amendment into "a font of tort law to be superimposed" upon all prison systems. *Daniels v. Williams*, 474 U.S. at 332, quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976).

Such a radical transformation is constitutionally unwarranted and would create a practicably unworkable situation. Given that prisons by their very nature are dangerous and that many inmates live in fear of others, there is no principled basis for singling the petitioner out for special protection solely because of his transsexual status but not extending that level of protection to other inmates who, because of personal characteristics or circumstances unique to them, also claim to be at risk in the prison population. Due to the wide range of personal

attributes found among prisoners in the penal system and the non-existence of any "normal" or "regular" prisoner, there is no logical stopping point in an approach that requires courts to attach dispositive weight to any specific characteristic or situation as warranting heightened protection for the class of prisoners fitting that mold. A decision holding that the petitioner, simply because he is a pre-operative transsexual, should have been assigned to special detention logically also envelopes homosexuals, transvestites, pedophiles, and other individuals exhibiting an unconventional sexual orientation. The rule would not stop there, however.

Courts would also be obligated to embark on an endless probe of the particulars of each prison's population and environment to determine whether certain traits or conditions exist that demand special protection under the Eighth Amendment. A white male, for example, would probably be deemed to be no more at risk than any other member of the general prisoner population at the Central Utah Correctional Facility but, under the rule advanced by the petitioner, might be found to be such a minority at the Arecibo District Jail in Puerto Rico that a constitutional obligation exists to sequester that inmate from the rest of the population. It is easy to envision a number of other examples, such as whether the assignment of a child abuser to the general population of a prison constitutes an Eighth Amendment violation, that attest to the unworkability of such a rigid rule of constitutional law.

Cost considerations further demonstrate the inappropriateness in interpreting the Constitution in the broad manner that the petitioner urges. "[T]he problems of prison population and administration have been exacerbated by the increase of serious crime and the effect

of inflation on the resources of States and communities." *Rhodes v. Chapman*, 452 U.S. at 351, n. 16. A rule requiring special housing and other precautions for inmates solely because of certain of their traits and circumstances would have a potentially devastating effect on the states, especially those with few prisons and limited flexibility with respect to where to assign such inmates. Many states house all female prisoners within one institution. Some states similarly have a limited range of minimum, medium and maximum security prison facilities in which they can separate defendants convicted of non-violent crimes from the more dangerous criminal offenders. *See generally* American Correctional Association, DIRECTORY OF JUVENILE AND ADULT CORRECTIONAL DEPARTMENTS, INSTITUTIONS, AGENCIES & PAROLING AUTHORITIES (1993). Requiring extraordinary treatment for inmates on the basis of "special circumstances" presents these states with the Hobson's choice of either facing liability for not housing these inmates away from the rest of the prison population, or devoting scarce (or non-existent) financial resources to the construction of myriad separate facilities for these various types of inmates.

The petitioner's proposed rule is both practically unsound and constitutionally unnecessary. The relevant inquiry in determining whether prison officials have acted with deliberate indifference toward a prisoner who is assaulted by another inmate is one that focuses on all of the circumstances surrounding and leading up to that inmate's assault. That inquiry reveals that the officials in this case made a considered decision in transferring the petitioner to and assigning him to the general population at Terre Haute and did not act with the requisite wantonness that the Eighth Amendment proscribes. The petitioner's assignment to a higher security institution was

wholly warranted because, by his own account, he continued to engage in a number of acts since his initial incarceration that constituted infractions of prison rules and regulations and resulted in a number of disciplinary sanctions entered against him. (J.A. 57-63 ¶¶ 52-85; J.A. 112-113 ¶¶ 16-19.) He freely admits, for example, that he "operated a credit-card fraud organization while in the custody of state and federal authorities and though serving a twenty year federal sentence and a consecutive thirty year state sentence, this had not deterred her from continuing to engage in these activities." (J.A. 57 ¶ 52.) The most recent of these actions, as the district court found, resulted in disciplinary sanctions that included "a recommendation for a disciplinary transfer." (J.A. 123.)

The district court also found that prison officials believed that the petitioner's transfer to Terre Haute was appropriate "to handle the problems and needs presented by plaintiff." (*Id.*) The petitioner offered no evidence below refuting the determination of prison officials that he was eligible for assignment to Terre Haute based on his security classification level and that of the institution. (J.A. 17 ¶ 9.) Nor has he ever disputed that his assignment to the general population at Terre Haute occurred after officials there met with him for the purpose of determining the most appropriate assignment for him at that facility. *See* 28 C.F.R. § 522.21(a); J.A. 94 ¶ 5. Nor did he ask not to be assigned to the general prison population when he met with officials responsible for his placement at Terre Haute. This Court long ago recognized that no Eighth Amendment violation occurs where "[t]here is no purpose to inflict unnecessary pain. . . ." *Francis v. Resweber*, 329 U.S. 459, 464 (1947). There is no constitutional basis for inferring that such a purpose exists here solely because the respondents transferred a pre-operative transsexual prisoner to Terre

Haute and did not keep him in administrative detention.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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